

SS-8 Determination—Determination for Public Inspection

Occupation 02SAL.56 Salesperson	Determination: <input checked="" type="checkbox"/> Employee <input type="checkbox"/> Contractor
UILC	Third Party Communication: <input checked="" type="checkbox"/> None <input type="checkbox"/> Yes

Facts of Case

The worker initiated the request for a determination of her work status as a lead generator and marketing director with duties that included hiring, training, supervising staff, and data entry in tax years 2012 and 2013. The firm's business is described as a model and talent school offering modeling and acting classes to children and young adults ages 7 to 17.

The firm's response described the business as a performing arts academy. The worker performed services as lead generator.

According to the firm, no training was provided to the worker and there were no actual job assignments given. The worker determined the methods to be used to perform the job. There were no reports required of the worker other than the worker providing a list of names and phone numbers after leads were obtained by the worker. The worker did not have a set routine and she was able to go anywhere she could to obtain leads. There were no required meetings. The worker was not required to perform the services personally; the worker could hire and pay for any helpers.

The worker responded that her training and instructions were per the guidelines and training booklets provided to her. The job assignments were provided by email or phone as to hour and location she was to be present. The firm determined the methods by which the worker's services were performed; any problems or complaints encountered by the worker were directed to the firm's executive director or her supervisor for resolution. The worker provided her time sheets and leads via a word document. She stated her services were performed at malls and high schools. She was not required to perform the services personally; any additional personnel were hired and paid by the firm.

The firm provided lead slips, promotional materials and pens; the worker furnished nothing and did not incur expenses. Both parties acknowledged that the worker did not lease equipment, space or facilities. The firm responded that the worker was paid an hourly wage and per lead. She was allowed a drawing account for advances which depended on if she traveled; she could receive a prepaid stipend for car rental, travel, etc. which was restrictive and tied to productivity. The customer pays the firm. The firm indicated the worker was not at risk for an economic loss in this work relationship.

There were no benefits extended to the worker other than bonuses. Either party could terminate the work relationship without incurring a liability or penalty. The worker was performing same or similar services for others during the same time frame and was not required to obtain firm's approval; the worker agreed, responding that she was not allowed to work for a competing business.

The worker provided a copy of the document that covered the categories of: Job Overview as a promotional model for the firm, etc; Job Responsibilities such as the quota of 4 leads per hour to stay employed, etc.; While on Duty, no gum, no foul language, and expected to work the entire event of 7-8 hours as directed by a supervisor and approved by the Marketing Director, etc.; [REDACTED] or no credit for a lead, etc.; [REDACTED] are counted and reviewed by both the Supervisor and the Marketing Director; Dress Code; Hotel Rules; Your Supervisor's Role; and, Pay and Bonuses, that covered the hourly rate, the bonus paid on X number of leads, a per diem if staying overnight for an event. In addition, she provided the [REDACTED]: Talking Points' and the [REDACTED].

Analysis

A worker who is required to comply with another person's instructions about when, where, and how he or she is to work is ordinarily an employee. This control factor is present if the person or persons for whom the services are performed have the right to require compliance with instructions. Some employees may work without receiving instructions because they are highly proficient and conscientious workers or because the duties are so simple or familiar to them. Furthermore, the instructions, that show how to reach the desired results, may have been oral and given only once at the beginning of the relationship. See, for example, Rev. Rul. 68-598, 1968-2 C.B. 464, and Rev. Rul. 66-381, 1966-2 C.B. 449.

Training a worker by requiring an experienced employee to work with the worker, by corresponding with the worker, by requiring the worker to attend meetings, or by using other methods, indicates that the person or persons for whom the services are performed want the services performed in a particular method or manner. This is true even if the training was only given once at the beginning of the work relationship. See Rev. Rul. 70-630, 1970-2 C.B. 229.

Payment by the hour, week, or month generally points to an employer-employee relationship, provided that this method of payment is not just a convenient way of paying a lump sum agreed upon as the cost of a job. In such instances, the firm assumes the hazard that the services of the worker will be proportionate to the regular payments. This action warrants the assumption that, to protect its investment, the firm has the right to direct and control the performance of the workers. Also, workers are assumed to be employees if they are guaranteed a minimum salary or are given a drawing account of a specified amount that need not be repaid when it exceeds earnings. See Rev. Rul. 74-389, 1974-2 C.B. 330.

If the person or persons for whom the services are performed ordinarily pay the worker's business and/or traveling expenses, the worker is ordinarily an employee. An employer, to be able to control expenses, generally retains the right to regulate and direct the worker's business activities. See Rev. Rul. 55-144, 1955-1 C.B. 483.

A person who can realize a profit or suffer a loss as a result of his or her services is generally an independent contractor, while the person who cannot is an employee. See Rev. Rul. 70-309, 1970-1 C.B. 199. "Profit or loss" implies the use of capital by a person in an independent business of his or her own. The risk that a worker will not receive payment for his or her services, however, is common to both independent contractors and employees and, thus, does not constitute a sufficient economic risk to support treatment as an independent contractor. If a worker loses payment from the firm's customer for poor work, the firm shares the risk of such loss. Control of the firm over the worker would be necessary in order to reduce the risk of financial loss to the firm. The opportunity for higher earnings or of gain or loss from a commission arrangement is not considered profit or loss.

We have considered the information provided by both parties and have applied the above law to this work relationship. In this case, the firm retained the right to change the worker's methods and to direct the worker to the extent necessary to protect its financial investment and business reputation and to ensure its customers' satisfaction. The worker was not operating a separate and distinct business; the worker did not invest capital or assume business risks, and therefore, did not have the opportunity to realize a profit or incur a loss as a result of the services provided. Integration of the worker's services into the business operations generally shows that the worker is subject to direction and control. When the success or continuation of a business depends to an appreciable degree upon the performance of certain services, the workers who perform those services must necessarily be subject to a certain amount of control by the owner of the business. In this case, the worker was not engaged in an independent enterprise, but rather the services performed by the worker were a necessary and integral part of the firm's business.

CONCLUSION

Based on the above analysis, we conclude that the firm had the right to exercise direction and control over the worker to the degree necessary to establish that the worker was a common law employee, and not an independent contractor operating a trade or business.