

SS-8 Determination—Determination for Public Inspection

Occupation 03TRA Tradespersons	Determination: <input checked="" type="checkbox"/> Employee <input type="checkbox"/> Contractor
UILC	Third Party Communication: <input checked="" type="checkbox"/> None <input type="checkbox"/> Yes

I have read Notice 441 and am requesting:

- Additional redactions based on categories listed in section entitled "Deletions We May Have Made to Your Original Determination Letter"
- Delay based on an on-going transaction
- 90 day delay

For IRS Use Only:

Facts of Case

The worker initiated the request for a determination of his work status as a laborer doing painting, hanging and mudding drywall, and as a gopher in tax years 2017 and 2018, for which he received Form 1099-MISC. He had provided services prior on occasional weekends to help with large jobs. The firm's business is described as remodel, paint, light construction, and restoration.

The firm's response was signed by the business owner. The firm's business is carpentry, cabinet, general contractor; the worker was painting, trim carpentry, demolition, clean-up, drywall, and labor services.

The worker indicated he was not given specific training; but, he was given instructions the night before as to where he would be working and with who, via text messages from the firm. 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 for resolution. The services were rendered at various locations. The worker was not required to perform the services personally; any additional personnel were hired and paid by the firm.

According to the firm, the worker and the firm's owner had a verbal agreement that the worker would be trained to be molded into a full-time employee, depending on the skills he learned and if he could retain the skills for a permanent position. The job assignments were conveyed by phone or text. 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 for resolution. The worker's routines varied with the services rendered at the firm's customer locations. The worker was not required to perform the services personally.

The firm and worker acknowledge the firm provided tools, materials, and supplies; and, the worker furnished some tools as well as fuel/mileage. The worker did not lease equipment, space, or a facility. The firm paid the worker an hourly wage. The customers paid the firm. The worker did not indicate if he was at risk for a financial loss in this work relationship; the firm indicated he was at risk for loss of tools. The firm established the level of payment for services provided.

Both parties confirmed there were no benefits made available to the worker and either party could terminate the work relationship without incurring a liability or penalty. The worker was not performing same or similar services for others during the same time frame. The worker believes he was fired for asking repeatedly to be put on payroll. The firm stated the worker was a labor assistant; he could not perform at the level required by firm so he was let go.

The worker provided a copy of the Employee New Hire form that was included in the Employee Summary folder he was given at the onset of the work relationship. The packet contained information about pay, benefits, and the policies and procedures that support the employment relationship between the parties, request for completion of the employee form, Form W-4, Direct Deposit form, the OT contract, noting payroll was paid bi-weekly, the payment of vacation time, the holiday policy, and accrual of Compensatory Time vs. Over Time, and the worker's election as to which he preferred.

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.

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.

The establishment of set hours of work by the person or persons for whom the services are performed is a factor indicating control. If the nature of the occupation makes fixed hours impractical, a requirement that workers be on the job at certain times is an element of control.

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.

Lack of significant investment by a person in facilities or equipment used in performing services for another indicates dependence on the employer and, accordingly, the existence of an employer-employee relationship. The term "significant investment" does not include tools, instruments, and clothing commonly provided by employees in their trade; nor does it include education, experience, or training. Also, if the firm has the right to control the equipment, it is unlikely the worker had an investment in facilities.

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. "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 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 and that its contractual obligations were met. 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

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.