

## SS-8 Determination—Determination for Public Inspection

Occupation

03TRA.32 Laborer/Trades

Determination:

☒ Employee

☐ Contractor

UILC

Third Party Communication:

☒ None

☐ Yes

### Facts of Case

The worker initiated the request for a determination of his work status as a window cleaner/laborer in tax year 2013. The firm's business is described as a professional commercial and residential window cleaning service.

The firm's response was signed by [REDACTED], owner. The firm's business is described as window cleaning services. The worker performed services as a window cleaner on several occasions when the firm obtained jobs that were too big for the firm to handle.

According to the firm, the worker was not given training – he had experience. The firm contacted the worker as to his availability to work jobs. The firm responded that the methods to be used would be determined by the worker. The firm resolved any problems or complaints that the worker encountered. The firm responded that the worker performed services on the customers' premises. The worker was not required to perform the services personally; however, substitutes and helpers were never hired.

The worker indicated he was given specific on-the-job training and instructions by the firm's current employees. The job assignments came from the firm's lead technician or the firm's owner. 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 customer locations 90% of the time – performing the assigned tasks. When all work orders were completed, the worker drove the company vehicle back to the office, unloaded the vehicle, and clocked out on a time card. The worker was required to perform the services personally; any additional personnel were hired and paid by the firm.

The firm responded that the worker provided all equipment, buckets, poles, etc; the firm furnished nothing. The firm stated the worker was paid piecework; however, the customer paid the firm. The worker not covered under firm's workers' compensation insurance plan. It was indicated that the worker was not at risk for a financial loss. The firm responded that the worker and firm worked out a price for services.

The worker responded that the firm provided a company vehicle, company uniform, and all cleaning supplies and equipment. The worker furnished nothing and he did not lease equipment and did not incur expenses in the performance of the job. The worker stated he was paid an hourly wage by the firm; the customers paid the firm. The worker concurred that he was not covered under the firm's workers' compensation insurance policy. The worker indicated that he was not at risk for a financial loss in this work relationship and that it was the firm that established the level of payment for services provided or products sold.

There were no benefits extended to the worker. Either party could terminate the work relationship without incurring a liability or penalty. The firm responded that the worker was performing same or similar services for others during the same time frame. The worker stated that he wore a uniform with a company logo and the firm's website had a photo of the worker (and others). The worker provided the printed copies from firm's web page. Both parties acknowledged that the worker was injured on the job on 11/7/2013.

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## Analysis

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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.

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.

The fact that the person or persons for whom the services are performed furnish significant tools, materials, and other equipment tends to show the existence of an employer-employee relationship. See Rev. Rul. 71-524, 1971-2 C.B. 346.

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. See Rev. Rul. 71-524, 1971-2 C.B. 346.

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 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

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.