

SS-8 Determination—Determination for Public Inspection

Occupation

03TRA.47 Laborer/Trades

Determination:

☒ Employee

☐ Contractor

UILC

Third Party Communication:

☒ None

☐ Yes

Facts of Case

The worker initiated the request for a determination of his/her work status as a laborer in tax years 2007 through 2009. The firm's business is described as mobile home repair – roofing/shingles. The number of workers in the class was 5 to 8.

The firm's response was signed by [REDACTED], CPA. The firm's business is described as mobile home repair. The worker's services were not identified; it was stated that he has his own tools and equipment and made his own schedule and performed similar services for others. The number of workers in the class varied.

According to the firm, there was no training given to the worker. The firm calls the workers to see if they have time to complete a project. The firm responded that the worker determined the methods by which services were performed. The worker was required to contact firm if any problems were encountered that required resolution. The worker was not required to perform the services personally; additional helpers were hired and paid by worker.

The worker stated that he was given specific on-the-job training and instructions. The job assignments came from the manager and owner. It was the firm that 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 8-10 hours a day. The worker was required to perform the services personally; any additional personnel were hired and paid by the firm.

The firm's response indicated the firm provided the materials and the worker provided equipment. The firm indicated that the worker incurred expenses for travel, tools, meals, and lodging. The firm paid the worker on a piecework basis and it varied by the job. The customer paid the firm.

The worker indicated the firm provided all items and he furnished nothing. The worker 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 and the customer paid the firm. The worker was not sure if he was covered under the firm's workers' compensation insurance policy. The worker stated he was not at risk for a financial loss in this work relationship.

Both parties concur that no benefits were extended to the worker and that either party could terminate the work relationship without incurring a liability or penalty. The firm indicated the worker was performing same or similar services for others during the same time frame; the worker disagreed, stating he worked as a laborer shingling roofs and doing minor repairs to trailer homes.

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.

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.

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.