

## SS-8 Determination—Determination for Public Inspection

Occupation

03TRA.102 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 an installer of safety netting in tax year 2014. The firm's business is described as construction.

The firm's response was signed by the firm's president. The firm's business is described as construction. The worker performed services as safety netting installation.

According to the firm, there was no training was provided to the worker. The firm provided one list of jobs to the worker. The firm responded that the worker determined the methods by which the services were rendered. Any problems encountered by the worker were directed to firm and customer for resolution. The worker's daily routine was unknown to the firm; the worker made his own schedule. The services were rendered mostly in [REDACTED]. The worker was required to perform the services personally.

The worker responded that he was given specific training and instructions as to the proper method for installation of safety netting and straps. The job assignments came from the firm and it was the firm that determined the methods by which the worker's services were performed. He stated that any problems or complaints he encountered were directed to the firm for resolution. The services were rendered at customer locations. The worker would arrive and notify the store manager his team was there to install safety netting, when complete he was to obtain the store manager's signature on a completion statement and then go to the next location on the list. He agreed that he was required to perform the services personally.

The firm responded that nothing was provide to the worker; the customer provided the necessary supplies/materials. The worker provided small tools; the worker did not lease equipment, space, or a facility. The firm paid the worker on a piecework basis; the customer paid the firm. The firm did not carry workers' compensation insurance on the worker. The firm indicated that the worker established the level of payment for services rendered.

The worker stated that the firm provided all materials and supplies required; he was reimbursed for gas for the firm's truck and some other expenses. He indicated that he furnished nothing; worker did not lease equipment and did not incur expenses in the performance of the job. He responded that he was paid an hourly wage, but was not paid overtime. The customer paid the firm. The worker stated he did not establish the level of payment for services provided or products sold.

Both parties concur that no benefits were extended to the worker. 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 customer furnished subcontract badges designated that they were authorized to work there under a contract with the firm.

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## 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.

If the services must be rendered personally, presumably the person or persons for whom the services are performed are interested in the methods used to accomplish the work as well as in the results. See Rev. Rul. 55-695, 1955-2 C.B. 410.

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.