

SS-8 Determination—Determination for Public Inspection

Occupation

03TRA.138 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 apprentice plumber in tax years 2010 through 2013. The firm's business is described as a plumbing company. The worker indicated that the firm paid for the apprentice plumber program.

The firm's response was signed by [REDACTED], master plumber. The firm's business is described as installing plumbing in homes. The worker performed services as a plumber. In a telephone call to the firm's owner he stated there was a verbal agreement that the worker would pay his own taxes; however, there was no clarification as to self-employment taxes or FICA.

Both parties acknowledged that the work relationship continued into 2014 and that there were no changes to the work arrangement.

According to the firm, the worker was told where to go for the jobs as the builders contacted the firm. The firm determined the methods by which the worker performed his job. The worker was required to notify the firm if there were any problems to be resolved. The firm indicated that the worker worked if needed or if he wanted to. The firm responded the worker was required to perform the services personally. The firm hired and paid for substitutes or helpers; however, the worker had workers on other jobs that were not the firm's job.

The worker replied that he was given specific training and instructions since he was working as an apprentice plumber. The jobs were assigned by the firm generally from 8 a.m. to 5 p.m. and it was the firm that determined the methods by which the worker's services were performed. The worker concurred that he was required to perform the services personally, with any additional personnel being hired and paid by the firm.

The firm responded that the firm provided materials and the worker provided tools. The firm indicated the worker incurred expenses for gas and transportation and the firm reimbursed for materials or equipment. The firm stated the worker was paid a salary; the customers paid the firm. The worker was not at risk for a loss in this work arrangement.

The worker indicated the firm provided materials, permits, etc. and that he furnished his own transportation. He stated he was paid an hourly wage and the customer paid the firm. The worker was not at risk for a financial loss in this work relationship other than his truck and possible personal injury.

The firm responded that no benefits were extended to the worker; the worker indicated that paid vacations and paid holidays were available to him. Both parties agree that either party could terminate the work relationship without incurring a liability or penalty. The firm and worker disagree as to whether the worker was performing same or similar services for others during the same time frame. The firm indicated the worker was managing his own business while working for the firm, something that would not have been allowed if he was an employee. The firm did confirm that he has never had employees and that he tells anyone he hires that they are responsible for their own taxes.

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.

A continuing relationship between the worker and the person or persons for whom the services are performed indicates that an employer-employee relationship exists. A continuing relationship may exist where work is performed in frequently recurring although irregular intervals.

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.

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.

Your statement that the worker was an independent contractor pursuant to an agreement is without merit. For federal employment tax purposes, it is the actual working relationship that is controlling and not the terms of the contract (oral or written) between the parties.

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.