

SS-8 Determination—Determination for Public Inspection

Occupation

04FSC.24 Overseer

UILC

Determination:

☒ Employee

☐ Contractor

Third Party Communication:

☒ None

☐ Yes

Facts of Case

The firm is in the business of providing group fitness class instructions and offering franchising opportunities. The worker was engaged by the firm to provide marketing services. The firm reported the worker's remuneration on Forms 1099-MISC for 2011 through 2015.

Information from the parties supports that the firm relied upon the worker's prior training and experience to perform her services. The firm stated it only provided her with minimal input and guidance. The worker's work assignments and projects were determined by the worker's expertise and by special requests made by the firm. If problems or complaints occurred, the worker contacted the firm and both parties were responsible for their resolution. The worker was required to document her tasks each week. She had no set schedule and was free to determine her daily work schedule. The worker performed her services on the firm's premises and other locations, and also from her home. She was not required to attend meetings and no penalties were incurred for not attending. The worker was required to perform her services personally.

The firm provided the software for graphics. The worker provided her own computer and hardware. The firm reimbursed the worker for printing expenses and paid her travel expenses. Information provided by the worker shows the firm paid the worker on a salary basis, on a bi-weekly schedule. Customers paid the firm directly. Neither party indicated an investment by the worker in the firm or a related business, or the risk of the worker incurring a financial loss beyond the normal loss of compensation.

The firm stated that it did not make benefits available to the worker. The firm did not prohibit the worker from performing similar services for others during the same time period. There is no evidence presented that the worker advertised her services or maintained a business listing. She performed her services under the firm's name. She was represented as a part of the firm's executive team. Both parties reserved the right to terminate the work relationship at any time without incurring a penalty or liability, and in fact, the firm terminated the work relationship.

Analysis

Factors that illustrate whether there was a right to control how a worker performed a task include training and instructions. In this case, while the firm relied upon the worker's prior training and experience to perform her services, it is only reasonable to assume that it retained the right to change the worker's methods and to direct the worker to the extent necessary to protect its financial investment. The firm allowed the worker flexibility in her schedule but it appears she provided services on a full-time basis. The term "full-time" may vary with the intent of the parties and the nature of the occupation since it does not necessarily mean working an eight hour day or a five or six day week. If the worker must devote substantially full-time to the business of the person or persons for whom the services are performed, such person or persons have control over the amount of time the worker spends working and, therefore, the worker is restricted from doing other gainful work. At times, the worker provided services from her home. Work done off the premises of the person or persons receiving the services, such as at the office of the worker, indicates some freedom from control. However, this fact by itself does not mean that the worker is not an employee. The worker was required to perform her services personally, meaning she could not engage and pay others to perform services for the firm on her behalf. 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. These facts show that the firm retained behavioral control over the services of the worker.

Factors that illustrate whether there was a right to direct and control the financial aspects of the worker's activities include significant investment, unreimbursed expenses, the methods of payment, and the opportunity for profit or loss. In this case, 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. "Profit or loss" implies the use of capital by a person in an independent business of his or her own. 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 firm paid the worker on a salary basis. Workers are assumed to be employees if they are guaranteed a minimum salary. These facts show that the firm retained control over the financial aspects of the worker's services.

Factors that illustrate how the parties perceived their relationship include the intent of the parties as expressed in written contracts; the provision of, or lack of employee benefits; the right of the parties to terminate the relationship; the permanency of the relationship; and whether the services performed were part of the service recipient's regular business activities. In this case, the worker performed her services on a continuing basis. A continuing relationship between the worker and the person or persons for whom the services are performed indicates that an employer-employee relationship exists. The worker performed her services under the firm's name. She was not engaged in an independent enterprise, but rather the marketing services performed by the worker were a necessary and integral part of the firm's fitness and franchise business. 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. The worker could have provided similar services for others during the same time period; however, it is possible for a person to work for a number of people or firms concurrently and be an employee of one or all of them. Although the firm stated that it did not provide benefits to the worker, it terminated the work relationship without incurring a liability. The right to discharge a worker is a factor indicating that the worker is an employee and the person possessing the right is an employer. These facts show that the firm retained control over the work relationship and services of the worker.

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.