

SS-8 Determination—Determination for Public Inspection

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| Occupation 04FSC.38 Overseer | Determination: <input checked="" type="checkbox"/> Employee <input type="checkbox"/> Contractor |
| UILC | Third Party Communication: <input checked="" type="checkbox"/> None <input type="checkbox"/> Yes |

Facts of Case

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The worker initiated the request for a determination of his work status as a 'virtual' air-traffic controller in tax years 2014 through 2016. The firm's business is described as a pilot training platform whose customers are pilots and aviation enthusiasts. The customers serve as pilots in a simulation of the National Airspace System.

The response was signed by ██████████, President and CEO. The firm's business is described as a multi-user network for flight simulation. The worker performs services as an air traffic controller specialist to provide air traffic control services to the firm's customers in a simulated environment.

According to the firm, shift assignments can be obtained by periodic bidding process for available shifts through a web-based scheduling system. The firm offers services 15 hours per day and 7 days per week. Any problems/complaints encountered by the are reported to the firm. The worker's daily routine on a scheduled shift, is to connect to the system, receive a briefing from the previous ATCS regarding existing traffic, assume control of the traffic, and continue until next ATCS logs in. The worker provides reports to the firm as well as any technical issues that may arise. There are no restrictions as to where the worker can be located when providing his services. The worker is not required to perform services personally. Any substitutes that can be utilized are limited to pool of currently qualified ATCS workers; the firm pays the substitute. There is an evaluation process in place to ensure the controllers are delivering service in line with FAA orders.

The worker indicated that he was given initial qualification training and there are recurrent training requirements as outlined in SOP; the training follows a company syllabus. The job assignments/available shifts are bid on each week and are retained based on a level of seniority. The firm determines the methods by which the worker's services are performed. The worker will direct any problems or complaints to the firm for resolution. He is required to report pilot rating completion/score, pilot deviation reports, and controller-in-charge memos after close of business. He acknowledged that he renders his services from his home. The worker responded that he is required to perform the services personally.

The firm provides the required software and service on the network. The worker provides a compatible computer, headset, and internet connection. The firm pays the worker an hourly wage; the customers pay the firm on a monthly or annual basis.

There are no benefits extended to the worker. Either party can terminate the work relationship without incurring a liability or penalty. The worker is not performing same or similar services for others. The services are performed under name of the firm.

The parties provided information as to the Controller Compensation Policy, Training and Quality Assurance policy, Training policy, Random Observations, Formal Observations, as well as the ██████████ – Contractor Agreement. Under this agreement: the worker is engaged to provide services on the firm's network; reporting directly to the Director of Quality Assurance; worker agrees to comply with company policies and procedures; worker is paid an hourly rate; training requirements (meeting with instructor 12 times per month); compensation upon completion of the firm's training program; worker agrees to provide at least 20 hours of air traffic controller service per two weeks for 6 months after completion of company training program; worker cannot delegate the performance of duties.

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.

Training a worker by requiring an experienced employee to work with the worker, by corresponding with the worker, by requiring the worker to attend meetings, or by using other methods, indicates that the person or persons for whom the services are performed want the services performed in a particular method or manner. This is true even if the training was only given once at the beginning of the work 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.

A requirement that the worker submit regular or written reports to the person or persons for whom the services are performed indicates a degree of control.

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.

The firm's statement that the worker is 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 retains 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 are met. The worker is not operating a separate and distinct business; the worker does not have an investment of capital or assume business risks, and therefore, does 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 is not engaged in an independent enterprise, but rather the services performed by the worker are a necessary and integral part of the firm's business.

CONCLUSION

Based on the above analysis, we conclude that the firm has the right to exercise direction and control over the worker to the degree necessary to establish that the worker is a common law employee, and not an independent contractor operating a trade or business.