

SS-8 Determination—Determination for Public Inspection

Occupation

04MAN Managers/Supervisors

Determination:

☒ Employee☐ Contractor

UILC

Third Party Communication:

☒ None☐ Yes

I have read Notice 441 and am requesting:

- ☐ Additional redactions based on categories listed in section entitled "Deletions We May Have Made to Your Original Determination Letter"
- ☐ Delay based on an on-going transaction
- ☐ 90 day delay

For IRS Use Only:**Facts of Case**

The worker initiated the request for a determination of her work status as director of operations in tax years 2016 to 2017. In this capacity, she worked on site, held signature authorization on bank accounts and credit cards, managed the operations of the facility, managed vendor payments and deposits for bank account, and submitted payroll reports for employees. The firm's business is described as a sports complex for youth baseball.

The firm's response was signed by the CFO. The firm's business is described as a youth baseball complex that operates specific tournament events for teams ages 10 to 13. The worker's services were that of operations management and event coordinator.

According to the firm, the worker was not given specific training and instructions. The job assignments were given verbally and she was given specific tasks for each event. The firm response indicated the worker determined the methods by which the worker's services were performed; however, any problems or complaints encountered by the worker were directed to the firm's VP of operations and project management for resolution. The worker's services were rendered primarily at the firm's location, according to a schedule that varied depending on tournaments, registering teams, booking hotels, and scheduling. The worker was required to perform the services personally.

The worker responded that she was given specific training and instructions on the equipment and for operations specific to the job duties performed with further training when new processes were implemented. The job assignments not defined in the agreement, were delegated via text message, email, and conference calls with upper management. The worker indicated it was the firm that determined the methods by which the worker's services were performed; and, the worker agreed that any problems or complaints encountered by the worker were directed to the firm's upper management for resolution. The worker's schedule was 9 am to 5 pm Monday through Thursday and 9 am to 11 pm on Friday; however, Saturday and Sunday when there were tournaments her hours were 7 am to 11 pm. The worker agreed that most of her time was spent at the firm's location and she was required to perform the services personally.

Both parties acknowledged that the firm provided everything for the daily operations; and, the worker furnished nothing. The worker did not lease equipment, space, or a facility. The worker indicated she did not incur expenses in the performance of the job as she was provided with a company credit card; the firm responded that she did incur expenses for travel and meals and was not reimbursed. The worker responded she was paid a salary, the firm stated she was paid a monthly retainer based on annual pay, and the contract defined her compensation as \$XX per annum, payable bi-weekly. The customers paid the firm. The firm and worker concurred with the following: the worker was not covered under the firm's workers' compensation insurance policy; the worker was not at risk for a financial loss in this work relationship; and, the worker did not establish the level of payment for services provided or products sold.

The firm and worker responded that there were no benefits extended to the worker. Either party could terminate the work relationship without incurring a liability or penalty. The worker stated she was not performing same or similar services for others during the same time frame; the firm was not sure. The business cards that identified her as Director of Operations were distributed during events,

The worker was to make sales calls from leads provided by the firm-provided software (60%) or from leads generated by her own initiatives (40%); she was required to generate a daily report as to the outcome for each lead generated. The principal service offered is to provide a location for youth baseball tournament-style camp including stay and play accommodations. All aspects of the sale were conducted by the firm and all orders were subject to the firm's approval.

Independent Contractor Agreement provided by both parties, included the following: the worker was to assist the firm with any operational and event-related issues requested; the worker was to ensure baseball events were executed to the highest standards, including managing advanced planning through the end of the event, supervise daily set up and break-down, manage all internal event requests, serve as a liaison between all departments and propose new ways to plan, communicate and execute events; hire, train, schedule and supervise event staff including coordinating all staffing needs across all departments, determine intern requirements and manage intern work schedules and task assignments, and conduct performance evaluations of general staff; oversee facility security and interact with public safety officials to ensure events run smoothly; and, assist in team recruiting process; and, assist in securing marketing relationships and sponsors.

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.

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.

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.

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 term "significant investment" does not include tools, instruments, and clothing commonly provided by employees in their trade; nor does it include education, experience, or training. Also, if the firm has the right to control the equipment, it is unlikely the worker had an investment in facilities.

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 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 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.