

SS-8 Determination—Determination for Public Inspection

Occupation 04MAN Senior Project Manager	Determination: <input checked="" type="checkbox"/> Employee <input type="checkbox"/> Contractor
UILC	Third Party Communication: <input checked="" type="checkbox"/> None <input type="checkbox"/> 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 his work status as a Sr. Project Manager in tax year 2018, for which he received Form 1099-MISC. The firm's business is described as project management and relocation services.

The firm's response was signed by the managing director. The firm's business is short-term facility management consulting assistance to help businesses make physical facility changes to their space. Commercial customers contract with the firm to provide the assistance for the project duration which is usually 3-6 months. The worker provided services as a Senior Project Manager to assist a client directly in fulfilling project team leadership, project expertise, and project task completion for the duration of the client project.

The worker responded that he was given specific daily instructions from the owner and director with job assignments disseminated via email and phone calls. The firm determined the methods by which the worker's services were performed. Any problems or complaints encountered by the worker were directed to the firm for resolution. The worker stated he was required to email the firm with status and meeting minutes for the firm's customer. His services were rendered at a 3rd party site or traveling to different customer sites, working on site 6-8 hours tracking, resolving, and managing resolution of issues and customer's expectations, with 70-90% of his time at the customer location and the remainder in his home office. Any additional personnel were hired and paid by the firm.

According to the firm, there was no specific training given and very little on-the-job instructions. The worker was expected to use his own means and methods to provide services on two projects. The job assignments were from the client, per the contract with the client, for two projects only. The worker determined the methods by which he performed his job; any problems or complaints encountered by the worker were directed to the client then to the firm for resolution. The services were rendered 70% from the worker's office and 30% on client sites with the worker setting his own hours and work schedule, with the client evaluating the worker's performance and reporting to the firm. The worker was required to perform the services personally; any additional personnel were hired and paid by the firm.

The worker stated the firm provided company email and business cards. The worker furnished a laptop and cell phone. The worker did not lease equipment, space, or a facility. The expenses incurred for printing, mileage, airline tickets, rental vehicles, tolls, items needed as directed or agreed upon by the customer and the firm were reimbursed by the firm. The firm paid the worker an hourly wage; the customers paid the firm. The worker stated he was not at risk for a financial loss in this work relationship and that he did not establish the level of payment for services provided.

The firm acknowledged that business cards and unique miscellaneous materials needed for the client relocation projects were provided to the worker and the worker furnished a home office, computer equipment and programs, cell phone, and a vehicle. The client provided office space, meeting room, and use of copier/printer. The firm reimbursed for travel expenses and unique misc materials (plan copies). The firm indicated the worker was paid an hourly rate and the clients paid the firm. The firm replied the worker was not covered under the firm's workers' compensation insurance and that the worker was at risk for an economic loss due to loss or damage to his home office, computer equipment, computer programs, cell phone, or vehicle. The worker established the level of payment for the services provided.

Both parties concur there were no benefits of insurance, paid vacations, holidays, or sick days extended to the worker; however, the worker indicated bonus pay was possible. 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 worker indicated he was represented as an employee with a business card. The firm terminated the work relationship via a telephone call.

The worker provided copies of emails that referenced: the worker was offered the position of Senior Project Manager, a starting salary of \$XX/hour with the condition to increase in 4 months based on completing a 4-month training period and on achieving the level of performance expected from a Senior Project Manager; dress code; working 4 days on client site and 1 day at home; the worker's full name on the business card; firm paying for travel time from the time he leaves his driveway; and, no payment for cellphone but the end of the year bonus should cover that expense.

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.

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.

If the person or persons for whom the services are performed ordinarily pay the worker's business and/or traveling expenses, the worker is ordinarily an employee. An employer, to be able to control expenses, generally retains the right to regulate and direct the worker's business activities.

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.

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.