

SS-8 Determination—Determination for Public Inspection

Occupation 04MAN.22 Manager	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

The worker initiated the request for a determination of her work status as a social media marketing manager in tax years 2011 through 2013. The firm's business is described as providing social media marketing services.

The firm's response was signed by [REDACTED], co-founder and CEO. The firm's business is described as a boutique social media agency. The worker performed services as a social media marketing manager. She wrote content for blog posts, newsletters, and social media sites. She also published the content based on the client's expectation, monitored the account, and engaged with the community. The number of workers in the class was 12-18.

According to the firm, it was the responsibility of the worker(s) to stay up-to-date on social media trends. The firm indicated the team shared articles on tips and best practices on the latest social media trends; but, participation isn't required. Instructions are outlined with each client project based on its scope of work. Any problems encountered by the worker could be directed to firm or to client directly for resolution. The worker could work from her home or coffee shops - it didn't matter as long as deadlines were met. Meetings/client calls were required but there were no penalties for missing them. The firm responded that the worker was not required to perform the services personally as every vendor has the option to subcontract to other vendors; as long as tasks were completed it did not matter to the firm as to who, when or where. The worker concurred that she and the firm had weekly phone calls to update on assigned work.

The firm provided the worker with the firm's email address as well as links to the company, the clients, and resources on various topics. The worker provided internet access and a computer. The worker did not lease equipment, space, or facilities. If the worker attended a client conference the meals that she paid for were reimbursed by the firm. The firm paid the worker according to the project fees which were broken down by month and occasionally she was paid by the hour. The client paid the firm. According to the firm, the worker established the level of payment for services provided.

The worker indicated the only expenses incurred in the performance of the job was for a laptop, phone, a wireless plan, and internet. She stated she was reimbursed for travel to meetings in [REDACTED] and business trips for the firm's clients. She was paid a salary of \$X/month based on hours worked per week. The worker stated she was told by firm to submit an invoice for her payment and how it was to be broken down. The worker responded that the firm established the level of payment for services provided or products sold to its clients.

Both parties concur that no benefits were extended to the worker. Either party could terminate the work relationship without incurring a liability or penalty. The firm indicated the worker was performing same or similar services for others during the same time frame; the worker disagreed. The worker stated she was required to return to the firm any client information for disbursement to client (reports, content calendars, blog posts, etc.) and that she (and others) were always representing the firm and all had the firm's .com email address for corresponding with clients and each other. The worker indicated the deadlines were established between the firm and client and then shared with the worker.

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. See, for example, Rev. Rul. 68-598, 1968-2 C.B. 464, and Rev. Rul. 66-381, 1966-2 C.B. 449.

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. See Rev. Rul. 70-309, 1970-1 C.B. 199, and Rev. Rul. 68-248, 1968-1 C.B. 431.

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. See Rev. Rul. 74-389, 1974-2 C.B. 330.

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. See Rev. Rul. 55-144, 1955-1 C.B. 483.

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. See Rev. Rul. 70-309, 1970-1 C.B. 199. "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 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 clients' 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.