

SS-8 Determination—Determination for Public Inspection

Occupation

04MAN.92 Manager

Determination:

☒ Employee

☐ Contractor

UILC

Third Party Communication:

☒ None

☐ Yes

Facts of Case

The firm is a real estate and property management business. The worker was engaged to perform services as a administrative assistant/manager. The firm treated the worker status as both employee and independent contractor, and issued to the worker Forms W-2 and Forms 1099-MISC at year-end, to report the monies received for her services as wages and non-employee compensation.

The work relationship began in 1997 and ended in 2013. The worker was hired by [REDACTED] (predecessor to [REDACTED]) in June of 1997 as an administrative assistant to the [REDACTED]. In addition to normal secretarial duties, the worker also handled the administration of the firm's payroll, 401k plan, health insurance, and certain human resource related duties. The worker was considered an employee of the firm.

In early 2013, the worker informed the firm's senior management that she would be retiring from her position, as she would be relocating and the distance and traffic conditions would make commuting nearly impossible and that she was ready for retirement. The worker offered to stay with the firm through March in order to be able to train her successor.

A week or two after the worker had given her notice, a replacement candidate was found. As that person was relatively inexperienced, the firm's senior management approached the worker about continuing to perform some of her duties from home on a consulting basis while her replacement was trained; specifically, the worker was to continue processing the firm's payroll and 401k submissions, and to assist with the renewal of the firm's insurance policies. These tasks were selected as they involved handling confidential information with which the worker was already familiar, and all of these duties could be performed with very little, if any, interaction with the firm. The worker agreed, and proposed an independent contractor agreement.

All training and instructions on how to perform the services were received from the firm. Work assignments were received through the firm's senior vice president of finance. The firm determined the work methods by which to perform the services. Problems and complaints were reported to senior vice president of finance for resolution purposes. The worker performed her services personally, from her home, with minimal time spent at the firm's office. The worker attended the firm's bi-monthly staff meetings, meetings with outside firms, company events, and retreats. The worker provided the firm with payroll, 401k submissions, HR documents, and insurance reports.

The firm provided the worker with the computer tech support, printer, toner, internet access, and office supplies needed to perform her services. The worker provided her own laptop. The worker did not incur expenses. The firm reimbursed for expenses related to mileage, tolls, notary commission, and all necessary supplies. The firm paid the worker on a lump sum (salary) basis for her services. The worker did not incur economic loss or financial risk related to the services she performed for the firm.

The firm did not carry workers' compensation insurance on the worker. No employment benefits were noted. The worker did not perform similar services for others, nor did she advertise her services to the public. The work relationship was continuous as opposed to a one-time transaction, and could have been terminated by either party at any time without incurring liabilities.

Analysis

The 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.

The facts provided for this case do not evidence the worker's behavioral control of the work relationship. The worker followed the firm's instructions, training, work methods, schedule, and routine in the performance of her services. The worker's services were performed personally, at the firm's location, and from her residence. The worker used the firm's facilities, equipment, tools, and supplies, as well as her own computer equipment, and she represented the firm's business operations in the performance of her services. As a result, the firm retained the right to direct and control the worker to the extent necessary to protect its investment, and the reputation of its business operations.

The facts provided for this case do not evidence the worker's financial control of the work relationship. The worker's remuneration was established by the firm. The worker had no opportunity for profit or loss as a result of the services performed for the firm. "Profit or loss" implies the use of capital by a person in an independent business of his or her own. The worker did not have a significant investment in the facilities, equipment, tools, or supplies used to perform her services for the firm. 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.

The worker performed services as requested by the firm, for an indefinite period of time, and both parties retained the right to terminate the work relationship at any time without incurring liabilities. The facts provided for this case do not evidence that the worker was engaged in an independent enterprise, but rather show that she performed her services as a necessary and integral part of the firm's business operations. 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.

Based on common law principles, the worker shall be found to be an employee for Federal employment tax purposes. For correction assistance, you may refer to Publication 4341, which can be obtained at www.irs.gov