

SS-8 Determination—Determination for Public Inspection

Occupation 04MAN.100 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 his work status as a digital marketing manager with duties that consisted of routine daily website updates, processing online orders, and assisting with customer service and social media marketing in tax years 2013 and 2014. The firm's business is described as professional audio, video, and lighting retail and rental business.

The firm's response was not signed. The firm's business is described as retail, repair, sales of professional audio. The worker performed services as online commerce and website development.

According to the firm, the worker was not given any training or instructions. The worker's assignments were given verbally if the worker was available. The firm stated the worker determined the methods by which the services were performed. The worker was required to contact the firm if he encountered any problems or complaints that required resolution. The worker worked 95% of the time on the firm's premises during business hours. The worker was required to perform the services personally; the firm hired and paid for others.

The worker indicated the job assignments came from the office manager ; a weekly list of projects and products to upload and on occasion emails from the design team. He indicated that the firm determined the methods as to how he was to do his job. He agreed that any problems or complaints encountered by the worker were directed to the firm for resolution and that his services were rendered at the firm's premises only, between 10 a.m. and 6 p.m. His daily routine consisted of punching a time clock, logging into the company site, processing orders, organizing daily invoices, checking emails and replying to customers, adding items to the online store, and email marketing. He added that he was required to attend mandatory quarterly meetings was required to perform the services personally, with any additional personnel being hired and paid by the firm.

Both parties acknowledged the firm provided a basic work station with computer, printers, phone, fax, office supplies, and a uniform T-shirts. The worker did not lease equipment and did not incur expenses in the performance of the job. The firm paid the worker an hourly wage and issued him a paycheck every two weeks. The customers paid the firm. The firm indicated the worker was covered under the firm's workers' compensation insurance policy. The parties disagreed as to whether the worker was at risk for a financial loss in this work relationship and who established the level of payment for services provided or products sold.

The firm responded that benefits extended to the worker consisted of personal days. 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 stated he was representing the firm in the work performed and the firm's logo'd work shirt he was required to wear. The worker indicated he a responsibility to find/reach out through e-commerce and uilux design to attract customers to the website. All orders are subject to firm's approval and with all proceeds payable to the firm.

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.

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.

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.

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 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.