

## SS-8 Determination—Determination for Public Inspection

Occupation

04MAN.121 Manager

Determination:

☒ Employee

☐ Contractor

UILC

Third Party Communication:

☒ None

☐ Yes

### Facts of Case

The worker initiated the request for a determination of her work status as a client service associate/office manager in tax years 2012 through 2016. In this capacity she opened the office at 9 a.m., assisted three financial advisors, answered phones and email, processed [REDACTED], scanned and fax documents, reconciled bank statements, and did data entry. The firm's business is described as financial planning/brokerage.

The firm's response was signed by the owner. The firm's business is described as operating a financial services office. The worker performed services as a client service associate, with routine daily tasks such as getting mail and distributing, answering phones, preparing checks to pay invoices, filling out forms, etc..

According to the firm, the worker was not given training or instructions. She performed the same job assignments daily and determined the methods to be used to complete the tasks. The worker was required to contact the firm with any problems or complaints that required resolution. The services were rendered at the firm's business location.

The worker responded that she was given specific training and instructions from the home office via telephone and attended a seminar at the home office. She received her job assignments verbally and via email, and stated it was the firm that determined the methods by which the worker's services were performed. The worker concurred that any problems or complaints she encountered were directed to the firm. The services were rendered on the firm's premises during business hours.

The firm indicated that the worker was provided a computer for security reasons and that the worker provided a rolodex, calculator, and office supplies. The worker was paid for billed hours worked bi-weekly. The worker was not covered under the firm's workers' compensation insurance. The firm responded that the worker was not at risk for a financial loss and that she did not establish the level of payment for services rendered or product sold.

The worker stated the firm provided everything – computer, desk, office, office equipment and furnishings, and office supplies. She indicated she worker furnished nothing and did not incur expenses in the performance of the job. The worker was paid an hourly wage; the customers paid the firm. The worker was not covered under the firm's workers' compensation insurance policy. She concurred she was not at risk for a financial loss in this work relationship and that she did not establish the level of payment for services provided or products sold.

Both parties acknowledged there were no benefits 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.

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## 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.

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.

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 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. 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.