

SS-8 Determination—Determination for Public Inspection

Occupation

Managers/Supervisors/Administrators

Determination:

☒ Employee

☐ Contractor

UILC

Third Party Communication:

☒ None

☐ 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 firm stated that the worker received assignments by email and by text message. The firm identifying desired outcomes (implement systems). If any problem or complaints arose; the firm was responsible for the resolution. The worker performed services such as taking incoming calls from prospective clients, complete memorandums for current clients, scheduling appointments. The worker did not hire any substitutes or helpers and was required to provide the service personally.

The firm provided the worker with materials needed such as iPhone 5. The worker provided computer, monitor, mouse keyboard paper writing instruments. The worker did not lease any equipment or facility. The worker stated that expenses are incurred, mailing expenses, primarily mailing clients. The worker receives an hourly wage.

There was a written agreement between the firm and worker. The worker indicates they did not perform the same or similar services for others. The worker did not advertise, did not maintain a business listing or a business office. The worker performed their services in the firm's name. Either party could terminate the relationship at any time without incurring liability, in fact the relationship has ended.

Analysis

After analysis of the common law factors as they related to this case, we find that the firm exercised sufficient control over the worker to establish the existence of an employer-employee relationship.

If the work is performed on the premises of the person or persons for whom the services are performed, that factor suggests control over the worker, especially if the work could be done elsewhere. See Rev. Rul. 56-660, 1956-2 C.B. 693. Work done off the premises of the person or persons receiving the services, such as at the office of the worker, indicates some freedom from control. However, this fact by itself does not mean that the worker is not an employee. The importance of this factor depends on the nature of the service involved and the extent to which an employer generally would require that employees perform such services on the employer's premises. Control over the place of work is indicated when the person or persons for whom the services are performed have the right to compel the worker to travel a designated route, to canvass a territory within a certain time, or to work at specific places as required. See Rev. Rul. 56-694, 1956-2 C.B. 694.

The firm determined the rate charged to the customers and provided the worker with the equipment materials and location to perform services. The fact that the person or persons for whom the services are performed furnishes significant tools, materials, and other equipment tends to show the existence of an employer-employee relationship. Lack of significant investment by a person in facilities or equipment used in performing services for another indicates dependence on the employer and, accordingly, the existence of an employer-employee relationship. The term "significant investment" does not include tools, instruments, and computer, monitor, 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 will have an investment in facilities.

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.

There was no contract, no business risk for the worker, and either party could terminate the relationship at any time; indicating the relationship of the parties was employer-employee. 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 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.

Accordingly, the worker was an employee of the firm for purposes of Federal employment taxes.