

SS-8 Determination—Determination for Public Inspection

Occupation

05ITE Instructors/Teachers

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 worker initiated the request for a determination of her work status as a teacher's assistant in tax years 2016 and 2017. In this position she opened the facility, performed housekeeping duties, cleaning the infants and toddler room, greeting the children, assisting with the care and feeding of the children, and end of the day closed the room and accounted for the children. She stated that she had done an internship for one month performing the same duties. The firm's business is day care center.

The firm's response was signed by the president. The firm's business is described as an educational consultant. The worker provided services as a curriculum development consultant, providing custom curriculum and educational solutions, which included training to staff to implement it. There was no agreement/contract between the parties.

The worker indicated she was given specific training and instructions for one month during her internship. The job assignments were given verbally, and it was the firm that determined the methods by which the worker's services were performed. Any problems or complaints encountered by the worker were directed to the firm for resolution. The worker stated she was required to report the name of the parents who picked up the child(ren) late and the number of minutes they were late in order for the firm to assess a late fee. The worker's services were rendered Monday through Friday from 6am to 10am on the firm's premises; her daily routine was to open the daycare center, clean-up from the previous day, and assist with caring for the children. She would be called in to close the center, as necessary. The worker was required to perform the services personally; any additional personnel were hired and paid by the firm.

The firm did not indicate if the worker was given specific training and instructions. The worker's job assignments were weekly based on the worker's schedule and educational goals. The firm responded that the worker determined the methods by which the worker's services were performed. The worker contacted the firm if problems or complaints arose, and resolution was handled by both parties, depending on the situation. The worker's services were rendered on the firm's premises. The worker was required to perform the services personally.

The worker responded that the firm provided cleaning supplies, school supplies for children, food supplies, first aid supplies, furniture, diapers, and other supplies. The worker furnished nothing. The worker did not lease equipment, space, or a facility; but, did incur the expense of uniforms. The worker was paid an hourly wage; the customers paid the firm. The worker indicated she was not at risk for a financial loss in this work relationship unless she damaged toys or equipment. The firm established level of payment for services provided.

The firm acknowledged the firm provided the premises. The worker furnished art supplies, computer, curriculum, lesson plan template, and pencils and markers. The worker did not lease equipment, space, or a facility and did not incur expenses in the performance of the job. The firm responded the worker was paid a lump sum; and, the customers paid the firm. The worker was not covered under the firm's workers' compensation insurance policy. The firm indicated the worker established level of payment for services provided.

The worker and firm concurred that no benefits were extended to the worker. 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 firm indicated the contract ended.

The worker provided a copy of the firm's Letter of Employment Offer to the worker for the position of 'Assistant Floater Teacher' for \$X/hour starting November 2016, and the benefit of a discount in tuition and yearly performance reviews, all being contingent upon the pre-employment screening. The worker submitted copies of pay statements for hours/compensation for a two week period, copies of work schedules (subject to change, depending on additional enrollment), copies of email traffic between firm and worker(s) regarding detailed daily progress reports for parents. The worker provided a copy of her resignation letter.

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.

Training a worker by requiring an experienced employee to work with the worker, by corresponding with the worker, by requiring the worker to attend meetings, or by using other methods, indicates that the person or persons for whom the services are performed want the services performed in a particular method or manner. This is true even if the training was only given once at the beginning of the work 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.

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. 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.

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 the firm's 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. For federal income tax withholding and social security, Medicare, and federal unemployment (FUTA) tax purposes, there are no differences among full-time employees, part-time employees, and employees hired for short periods. It does not matter whether the worker has another job or has the maximum amount of social security tax withheld by another employer. Income tax withholding may be figured the same way as for full-time workers.