

SS-8 Determination—Determination for Public Inspection

Occupation 05ITE Instructors/Teachers	Determination: <input checked="" type="checkbox"/> Employee <input type="checkbox"/> Contractor
UILC	Third Party Communication: <input checked="" type="checkbox"/> None <input type="checkbox"/> 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 his work status as a tutor in tax year 2018, for which he received Form 1099-MISC. He stated he taught daily classes using the center's work sheets and test prep materials for students assigned to the class. The worker stated that services were also rendered in June to September 2017; and, the only difference was that fewer hours were scheduled. The firm's business is described as a tutoring business.

The firm's response was signed by the manager. The firm's business is a tutoring center and the worker taught summer camp math and English. The firm indicated the worker was informed this was contract-based and the worker agreed and signed Form W-9.

The worker stated he was shown and was provided with the materials and methods to teach the children. The job assignments and the methods by which the worker's services were performed were determined by the firm. Any problems or complaints encountered by the worker were directed to the firm for resolution. The worker was required to provide checklists of work assigned to the children, The worker's services were rendered all weekdays between 9 am to 5 pm on the firm's premises, providing tutoring in reading/writing and math; and, on Saturday a class or individual tutoring was decided by the firm. The worker was required to perform the services personally; and, any additional personnel were hired and paid by the firm.

The firm responded that no training and instructions were given to the worker; the worker chose the job assignments of math and English based on his expertise. The worker determined the methods by which he performed the services. Any administrative problems or complaints encountered by the worker were directed to the firm for resolution. The worker decided his schedule in advance and services were rendered on the firm's premises. The worker was required to perform the services personally; any additional personnel was indicated as 'not applicable'.

The worker indicated the firm provided all academic materials and supplies and the location. The worker furnished nothing, he did not lease equipment, space, or a facility, and he did not incur any expenses. The firm paid the worker an hourly wage; and the customers paid the firm. The worker stated he was not at risk for a financial loss in this work relationship and that he did not establish the level of payment for services the provided.

The firm acknowledged providing space in the learning center. The worker furnished supplemental materials for teaching. The worker did not lease equipment, space, or a facility. The worker was paid a monthly lump sum. The customers paid the firm. The worker was not covered under the firm's workers' compensation insurance policy. The worker's risk for a financial loss in this work relationship was indicated as 'not applicable'. The firm stated the worker established the level of payment for services provided.

Both parties concur there were no benefits extended to the worker; although the worker indicated the possibility of bonuses. Either party could terminate the work relationship without incurring a liability or penalty. The worker responded he was not performing same or similar services for others during the same time frame; the firm answered as 'not applicable'. The worker indicated he left to return to college; the firm stated the job was completed.

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.

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.

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 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

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.

Please see www.irs.gov for more information including Publication 4341 Information Guide for Employers Filing Form 941 or Form 944 Frequently Asked Questions about the Reclassification of Workers as Employees and Publication 15 (Circular E) Employer's Tax Guide