

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 gymnastic coach and birthday party host in tax years 2018 and 2019, for which she received Form 1099-MISC. In this position she taught classes of four to seven children in a Wednesday evening class and she worked birthday parties on Friday and Saturday as a host supervising children and helping with set-up and clean-up. The firm's business is described as a gym providing gymnastics, tumbling and cheerleading and a facility to host children's birthday parties.

The firm's response was signed by a member. The firm's business is teaching gymnastics and tumbling and cheerleading to children, offering competitive gymnastics and cheerleading, and birthday parties. The worker taught up to three tumbling classes for younger kids (ages 18 months to 4 years old). She worked an average of 1-2 days per week. There were several weeks she did not work. She also worked a few birthday parties when it fit her schedule.

The worker indicated she was given training and instructions by shadowing other coaches and trained on how to host the parties (what to say, how to supervise, and how to clean). The job assignments were disseminated through the firm's office manager. The firm 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 clocked in and out on an online system and was required to report class attendance. All services were rendered on the firm's premises. She stated there were infrequent meetings every 4-6 months. 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 specific training and instructions were given, the worker was teaching based on her own prior experience. The job assignments were based on the availability of the worker. The individual worker determined the methods by which the services were performed. Any problems or complaints encountered by the worker were directed to the firm's owner for resolution. The worker's services were rendered on the firm's premises based on the worker's availability. The worker was required to perform the services personally; any additional personnel were hired and paid by the firm.

The firm and worker concur the firm provided the facility, gymnastics equipment, t-shirts for the worker(s), cleaning supplies, and technology. The worker furnished nothing, she did not incur expenses, and she did not lease equipment, space, or a facility. The firm paid the worker an hourly wage; the customers paid the firm. The worker was not covered under the firm's workers' compensation insurance policy. The worker was not at risk for a financial loss in this work relationship; the worker stated she was paid the same minimum hourly wage regardless of the number of children in a class and/or the number of parties. The firm indicated the worker establish the level of payment for the services provided.

Both parties acknowledged there were no benefits extended to the worker and that either party could terminate the work relationship without incurring a liability or penalty. The worker indicated she was not performing same or similar services for others during the same time frame. The work relationship ended when the fall/spring 2019 sessions ended.

The worker did not have a copy of the signed agreement. The firm provided a copy of the 'contract': the worker agreed to be an independent contractor and be paid an hourly wage and receive Form 1099-MISC at year-end. The worker provided the dates and times that she was available to work and that the firm could schedule her to work. She agreed to contact the firm at least a day in advance if she could not work the dates or if her daily or weekly schedule changed. She was available two evenings (3pm to 9pm) per week and Saturdays (10 am to 8pm).

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.

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 clothing 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 had an investment in facilities.

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