

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 her work status performing services such as cleaning the gym, coaching classes, working the front desk, signing up new members, and canceling members in tax years 2017 and 2018, for which she received Form 1099-MISC. In 2015 the worker was issued Form W-2; and, in 2016 she received Form W-2 and Form 1099-MISC. The firm's business is described as a gym and [REDACTED] gym. The worker stated that the firm informed her she'd receive a Form 1099-MISC as a means of reducing the firm's taxes.

The firm's response, signed by the owner, stated the firm's business is an athletic training center; and, the worker provided services as a personal trainer, coaching her clients with their workouts and coaching during [REDACTED] classes. The firm added that prior to January 2016 the gym had specific hours; however, after this date the gym became self-service, in that the members and trainers could access the facility with a key card.

The worker indicated that the firm paid for her [REDACTED] certification. The worker stated she was not a personal trainer and did not have her own clients. The worker's job assignments were via email, phone calls, and notes left on the desk. 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. She rendered her services from 8am to 3pm on the firm's premises. The worker was required to perform the services personally with any additional personnel being hired and paid by the firm.

According to the firm, the trainers were instructed to leave the facility tidy. The worker had her own client list and was coaching classes that were offered; the trainers could sign up to be the instructor. The worker determined the methods by which she performed her services. Any problems or complaints encountered by the worker were directed to the firm if it was equipment-related and if client-related the worker resolved the issue. The worker's services were rendered according to her schedule; however, classes and coaching were available for all coaches and trainers to sign up at the firm's location. The worker was required to perform the services personally; any additional personnel were hired and paid by the worker.

The worker indicated the firm provided everything. The worker furnished nothing other than proper clothing. She did not lease equipment, space, or a facility. The worker was paid a set fee per week for running the gym and teaching classes. She was guaranteed minimum of \$XX/week. The customers paid the firm. It was unknown to the worker as to whether she was/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 did not establish the level of payment for the services provided or products sold.

The firm response is that the firm provided the workout location and equipment. The worker furnished personal training knowledge and clients. The worker did not lease equipment, space, or a facility. The firm stated the worker was paid the training charges collected and a fee per class coached. The customers paid the firm and the worker; the worker received payment directly from her own clients and she received a flat fee to teach a training class. The worker was not covered under the firm's workers' compensation insurance policy. It was unknown to the firm if the worker was/was not at risk for a financial loss in this work relationship. The worker established the level of payment for services provided or products sold.

Both parties acknowledged there were no benefits extended to the worker; however, the worker noted she was paid when she was out for surgery. 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; however, the worker stated she worker was not working for other gyms in the same capacity, but was coaching a [REDACTED] team. The work arrangement ceased by mutual agreement.

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.

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.

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.