

SS-8 Determination—Determination for Public Inspection

Occupation

Personal Service Providers

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**

CASE FACTS: The firm is a fitness facility that offers fitness equipment, group classes, personal training sessions and consumer products. The firm engaged the worker as a personal trainer from 8/2018 to 07/2019. She taught fitness classes, training sessions for the firm's members and worked the front desk. The worker submitted a Form SS-8 after received a Form 1099-Misc from the firm. The firm replied with a Form SS-8

The worker stated she completed an application for the job. She was required to do a 3-week internship before she was hired. During this internship, she shadowed the owner of the firm and other trainers. She specified classes had to be formatted a certain way. She received her work assignment by way of an app affiliated with the firm. Personal training sessions were also scheduled through this app. Her classes were scheduled by management and any additional classes had to be approved by the owner of the firm. However, the firm contended the worker could make her own appointments for whatever time that was convenient for her and was also able to choose her own class format. The parties disagree on who determined the methods by which the assignments were performed. The worker stated the owner of the firm determined those methods whereas the firm stipulated it was up to the worker. The worker was required to contact the manager if any problems or complaints arose. Both parties agree no reports were required. The worker detailed her work schedule as having the flexibility to schedule her own personal training appointments, but the classes were scheduled by management. She performed her services 98% at the firm's location and 2% at another facility that paid the firm to facilitate a workout at their own office once a week. She would also work at the firm's front desk selling gym memberships and giving tours of the facility. She received regular remunerations for her services. The parties agree no meetings were required. The relationship between the parties was continuous, as opposed to a one-time transaction. The nature of this relationship contemplated that the worker would perform the services personally. The worker worked exclusively and on a continuing basis for the firm. Her services were an integral and necessary part of the services the firm provided to its customers. According to the firm, they were responsible for hiring and paying any substitutes or helpers.

The firm provided all necessary supplies, equipment, and materials to the worker at no cost to her. The worker did not lease equipment. The firm determined the fees to be charged. The worker did not incur any significant business expenses and was not reimbursed by the firm. The worker was paid an hourly wage when she worked sales or at the front desk. She was paid per class/customer at a determined rate set by the firm. The firm's customers paid the firm. The firm did carry worker's compensation insurance on the worker. The worker did not have a substantial investment in equipment or facilities used in the work and did not assume the usual business risks of an independent enterprise.

The worker was not eligible for sick pay, vacation pay, health insurance, or bonuses. Either party could terminate the worker's services at any time without incurring a penalty or liability. The worker was not a member of a union. According to internal research, the worker did not perform the services for others. She did not advertise her services to the public or maintain an office, shop, or other place of business. She was required to perform the services under the name of the firm and for the firm's customers. She was represented an employee of the firm to the firm's customers. The relationship between the parties has ended when the worker resigned.

Analysis

Generally, the relationship of employer and employee exists when the person for whom the services are performed has the right to control and direct the individual who performs the services, not only as to what is to be done, but also how it is to be done. It is not necessary that the employer actually direct or control the individual, it is sufficient if he or she has the right to do so.

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.

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

Factors that illustrate how the parties perceive their relationship include the intent of the parties as expressed in written contracts; the provision of, or lack of employee benefits; the right of the parties to terminate the relationship; the permanency of the relationship; and whether the services performed are part of the service recipient's regular business activities. In this case, both parties retained the right to terminate the work relationship at any time without incurring a liability.

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.

Usually, independent contractors advertise their services and incur expenses for doing so. In this case, the worker not only did not advertise her services, but she also filled out an application for the job. This is a strong indicator that the worker is not an independent contractor. Based on the common-law principles, the firm had the right to direct and control the worker. The worker shall be found to be an employee for Federal tax purposes.

The firm can obtain additional information related to worker classification online at www.irs.gov; Publication 4341.