

SS-8 Determination—Determination for Public Inspection

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| Occupation 05ITE.63 Instructor/Teacher | Determination: <input checked="" type="checkbox"/> Employee <input type="checkbox"/> Contractor |
| UILC | Third Party Communication: <input checked="" type="checkbox"/> None <input type="checkbox"/> Yes |

Facts of Case

125357

The worker initiated the request for a determination of his work status as a morning trainer and membership sales person in tax years October 2009 through December 2015. The firm's business is described as a gym.

The firm's response was signed by the owner. The firm's business is described as a fitness center. The worker performed services as a personal trainer.

Available research indicates the worker was issued Form W-2 from 2006 through 2010 and for tax years 2011 through 2015 he was issued Form 1099-MISC. There was no written agreement between the parties that defined the work relationship.

According to the firm, the worker was not given any training or instruction. The worker was to notify the owner of any problems or complaints he encountered that required resolution. The firm stated the worker's daily routine consisted of the worker conducting his business in early morning hours and lunch. In the down time in between, the worker performed the same services for the firm for a nominal fee in return for facility use. The firm responded that the worker was required to perform the services personally.

The worker indicated that he was given specific training and instructions as to membership sales and training technique in using fitness equipment. The job assignments came from the owner and his wife. The firm determined the methods by which the worker's services were performed. The worker agreed that any problems or complaints encountered by the worker were directed to the firm for resolution. His daily routine consisted of cleaning the gym, sweeping the front, watering plants, maintaining the bathrooms and towel service, occasionally selling memberships and training members on the use of machines. The services were rendered at firm's location. The worker was required to perform the services personally; any additional personnel were hired and paid by the firm.

The firm acknowledged that the firm provided the facility, all training equipment, aerobics room, etc., which was used by the worker. Both parties concurred that the worker did not lease equipment, space, or a facility. They agreed the firm paid the worker an hourly wage. The firm stated the customer paid the worker and the worker did not pay the total amount to the firm; the worker indicated the customer paid the firm. The firm and worker responded that the worker was not at risk for a financial loss in this work relationship. The parties did not agree as to who established the level of payment for services rendered or product sold.

The worker was not extended any benefits. Either party could terminate the work relationship without incurring a liability or penalty. The firm stated the worker was performing same or similar services for others during the same time frame; the worker did not agree. The firm stated the worker was allowed to put up flyers and pamphlets at the front desk advertising his services and that he wore clothing with his own logo/name.

In an attached letter, the firm described the relationship: the firm needed help between 7-10 a.m. and the worker had no clients during these hours (the firm paid him as an employee/issued Form W-2); in mid-2010 the worker wanted more money and the firm could not give him a raise; the worker wanted to work on a 1099-basis, but, he would maintain the same hours and train people for an agreed amount, with more flexibility to his schedule; the worker continued to sign people up for membership and take fees for the firm; he was the only personal trainer at the firm facility so he had every opportunity to grow his business; he worked at another fitness facility and trained some employees at a local business who had a workout facility on premise.

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.

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 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

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.