

SS-8 Determination—Determination for Public Inspection

Occupation

05ITE.75 Instructor/Teacher

Determination:

☒ Employee☐ Contractor

UILC

Third Party Communication:

☒ None☐ Yes**Facts of Case**

The firm is in the business of operating a franchise that offers painting classes and parties. The worker was an artist and was engaged to teach art classes. She received Forms 1099 for her services in 2012 through 2015; she continued to provide her services in 2016 as well. There was no written agreement.

Both the firm and the worker agreed that the firm provided training as well as instructions regarding how the class was to be conducted, the set-up for the class and the clean-up. The worker also sat in on a couple of classes to observe how the classes were taught. During her own class instruction, the worker was asked to promote the firm's facebook page. Private parties had contracts with the firm. The worker worked at the firm's studio and 'sold' painting classes and gift cards. The firm gave the worker her scheduled work assignments based on her availability as it was the firm that booked the parties and evening classes. The worker noted that she determined how the classes were taught but there were certain requirements such as using microphones, monitors and certain materials. The firm or team leader would be contacted if any issues or problems arose; however, the firm noted that both the firm and worker determined the methods and would resolve issues. The firm mentioned there were reports regarding the number of customers served; the worker indicated that she submitted invoices for the classes. Both agreed that the worker's work schedule varied. She worked mostly at the firm's locations though prep work could be done at home as well as at the firm. The firm noted that she worked when available to teach the painting classes and worked 100% of the time at the firm's location. There were staff meetings. Both parties agreed that the worker was required to provide the services personally with the firm hiring and paying any substitutes or approving those hired by the worker.

Both the firm and the worker agreed that the firm provided all art supplies as well as a uniform. Both agreed that the worker was paid per class; also the worker indicated that there were bonuses for large classes or parties and an hourly rate for prep time. She had no other economic risk. The customer paid the firm. The firm established the level of payment for services.

Both the firm and the worker agreed that there were no benefits and that either party could terminate the relationship without incurring a liability. The worker did not perform similar services for others. She had a business card that she used for a website that promotes her own artwork; this was not associated with the firm. She did not have rights to her work that was created for the firm where she was represented as an artist for the firm. The relationship has ended.

Analysis

In determining whether an individual is an employee or an independent contractor under the common law, all evidence of both control and lack of control or independence must be considered. The relationship of the worker and the business must be examined. Facts that show a right to direct or control how the worker performs the specific tasks for which he or she is hired, who controls the financial aspects of the worker's activities, and how the parties perceive their relationship should be considered. As is the case in almost all worker classification cases, some facts point to an employment relationship while other facts indicate independent contractor status. The determination of the worker's status, then, rests on the weight given to the factors, keeping in mind that no one factor rules. The degree of importance of each factor varies depending on the occupation and the circumstances.

Factors that illustrate whether there is a right to control how a worker performs a task include training and instructions. 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. The firm provided the worker with training whether locally or through its franchise arrangements, regarding classroom parameters and procedures. 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. The firm booked the classes/parties and scheduled the worker to teach based upon her availability. While the establishment of set hours of work by the person or persons for whom the services are performed is a factor indicating control, if the nature of the occupation makes fixed hours impractical, a requirement that workers be on the job at certain times is an element of control. Once the firm scheduled the worker to teach a class, she was expected to adhere to the time and day. Other elements of control would be working at the firm's location on a continuous basis. 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.

Factors that illustrate whether there is a right to direct and control the financial aspects of the worker's activities include significant investment, unreimbursed expenses, the methods of payment, and the opportunity for profit or loss. In this case, 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. 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. It was the firm that had the investment in the franchise, provided the facility and incurred the associated expenses. The worker was paid per class taught, received bonuses along with an hourly rate for her preparation time; she had no other economic risk other than the loss of that compensation.

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. There were no benefits and there was no written agreement. The worker was engaged to teach art classes at the firm's business location. When doing so, the worker was not engaged in an independent enterprise. Her services instead were part of the necessary activities of the firm's business operations. 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.

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.

Please see Publication 4341 for guidance and instructions for firm compliance.