

SS-8 Determination—Determination for Public Inspection

Occupation 05PCP.17 Personal Care Worker	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

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The worker initiated the request for a determination of her work status as a personal caregiver in tax year 2013. The firm's business is described as home health services.

The firm's response was signed by ██████████, president. The firm's business is described as a search firm for people looking for caregivers to hire. The worker performed services as an independent domestic worker providing housekeeping and personal care assistance. The number of workers in the class was sixteen.

According to the firm, the worker was not provided training. The job assignments came from the client via the firm's office. The client determined the methods by which assignments were performed. The firm acts as an intermediary between the client and worker. The services are performed at client's home. The worker was required to perform the services personally. The client contracts with the firm to hire any substitutes or helpers; the firm paid the substitutes/helpers.

The worker responded that firm provided orientation that included caregiver 101, practical skills test, and additional training in hospice care (the worker provided a copy of the training materials as well as the certificate of completion she earned. She was sent daily emails from the firm as to job assignments. She indicated that it was the firm that 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 concurred that the services were rendered at client locations and that she worker was required to perform the services personally, with any additional personnel being hired and paid by the firm.

The firm indicated that the worker was provided a name badge. The worker provided nothing. The firm paid the worker an hourly wage; the client paid the firm. The firm acknowledged that the worker did not establish the level of payment for services provided.

The worker indicated the firm provided a schedule, information on clients, photo ID badge, client care plan, and time cards; she furnished nothing. The worker did not lease equipment and did not incur expenses in the performance of the job. She acknowledged the firm paid her an hourly wage and that the client paid the firm.

Both parties concur that no benefits were extended to the worker and that either party could terminate the work relationship without incurring a liability or penalty. The firm indicated that the worker was performing same or similar services for others during the same time frame; the worker disagreed.

Both parties provided additional information for consideration. The worker provided: a copy of the Payroll Terms and Conditions; the non-compete agreement for caregivers; a copy of the disciplinary/counseling report issued to her; the Caregiver Performance Management document, employee non-medical home care acknowledgement, the Caregiver Orientation Agenda and power point presentation; copies of time sheets; a copy of her ID badge; a copy of email assignments for the following day; and the Form W-2 was for the day she attended orientation.

The firm provided a copy of the Independent Contractor agreement which included the caregiver's duties and responsibilities (personal care as well as household duties).

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. See, for example, Rev. Rul. 68-598, 1968-2 C.B. 464, and Rev. Rul. 66-381, 1966-2 C.B. 449.

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. See Rev. Rul. 70-630, 1970-2 C.B. 229.

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. See Rev. Rul. 55-695, 1955-2 C.B. 410.

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. See Rev. Rul. 74-389, 1974-2 C.B. 330.

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. See Rev. Rul. 70-309, 1970-1 C.B. 199. "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.