

SS-8 Determination—Determination for Public Inspection

Occupation 06AAS.21 Aide/Assistant	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

The worker initiated the request for a determination of her work status as a care provider in tax years 2013 and 2014. The worker stated she completed an application at the inception of the work relationship with the firm. The job included cooking, bathing, feeding, changing, laundry, cleaning, and administration of medications. The firm's business is described as hiring providers to service seniors, either in their home, adult day care centers, nursing homes, and other commercial senior care facilities.

The firm's response was signed by [REDACTED], owner. The firm's business is a sitter service for the elderly in their home, nursing care facility, or hospital. The worker performed services as a health care provider. The worker completed an application; she did not pay a fee to be put on a roster and there was no contract for service. The firm utilizes licensed CNA's and unlicensed caregivers. The firm does the reference check. The firm and client enter into an agreement whereby the client and firm agree to an hourly rate that is paid to the firm. The client reports to the firm the hours worked by the worker. The firm pays the worker an hourly wage and the difference between the two rates is the firm's profit.

According to the firm, the worker was provided the client's name and she contacts the client as to the duties; the client determined the methods by which the worker performed her services. If the worker encountered a problem/complaint she was to contact the client's responsible person, ie. spouse, son, or daughter, etc. The services were rendered at the client's location. The firm responded that the worker was required to perform the services personally; if substitutes or helpers were needed the firm was contacted by the client. The firm paid the substitute/helper.

The worker indicated she was given instructions/guidelines as to methodology employed to care for the senior patients by the firm. The job assignments came directly from the firm and the firm determined the methods by which the worker's services were performed. The firm issued the guideline parameters for each patient needs; any problems or complaints encountered by the worker were directed to the firm for resolution. The worker provided verbal reports to the firm. The worker's services were rendered 12 hours per day, 5 days per week, and on the patient's premises. The worker was required to perform the services personally; any additional personnel were hired and paid by the firm.

The firm and worker concurred that the firm and worker provide nothing – the client provided supplies, materials, and property. The worker did not lease space, equipment, or a facility and did not incur expenses in the performance of her job. The firm paid the worker an hourly wage; the client paid the firm. Both parties agreed that the worker was not at risk for a financial loss in this work relationship. The firm responded that it was the firm and client who established the level of payment (hourly rate) for the services provided; the worker indicated the firm established the level of payment for services rendered.

Both parties acknowledged that there were no benefits extended to the worker. Either party could terminate the work relationship without incurring a liability or penalty. The worker was not performing same or similar services for others during the same time frame.

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.

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.

Your statement that the worker was an independent contractor pursuant to an agreement is without merit. For federal employment tax purposes, it is the actual working relationship that is controlling and not the terms of the contract (oral or written) between the parties.

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.