

SS-8 Determination—Determination for Public Inspection

Occupation 06THE Therapists	Determination: <input checked="" type="checkbox"/> Employee <input type="checkbox"/> Contractor
UILC	Third Party Communication: <input checked="" type="checkbox"/> None <input type="checkbox"/> 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

The worker initiated the request for a determination of her work status as a 'consultant' in tax year 2017. She stated the firm referred to her as a 'consultant'; she did not feel she was self-employed. She conducted workshops, trainings, and professional development seminars. The firm's business was to provide educational services to K-12 schools and educational cooperatives.

The firm's response was signed by the vice president. The firm's business is described as an autism and behavioral consulting firm as well as staff development and training. The worker's services were to go to the schools and work with children and consult with the staff and administration. The firm stated in a telephone conversation that the worker was engaged to handle the overflow work that the firm could not do.

The worker stated she was given instructions as to where to work, who to work with, and what services to provide. The firm scheduled the workshops and training and professional developmental seminars. It was the firm or customer that determined the methods by which the worker's services were performed. If she encountered any problems or complaints they were directed to the firm for resolution. The worker's services were rendered at the customer location 85% of the time, the firm's premises 10% of the time and the remainder from her home. The worker was required to perform the services personally.

The firm responded that there was no specific training and instructions given to the worker. The worker's job assignments were assigned through the firm; the school district contacted the firm, who in turn called the worker with the specifics, and the worker made arrangements with the school. The firm, school, and worker determined the methods by which the worker's services were performed. Any problems or complaints encountered by the worker were handled by the firm, school, and the worker. The worker provided the firm with reports as to what she did. The worker was required to perform the services personally.

According to the worker, the firm provided her with an email address, website access, and business cards. The worker furnished nothing; and, she did not lease equipment, space or a facility or incur expenses in the performance of the job. She did incur travel expenses; but, was reimbursed by the firm. The worker responded that she was paid a minimum of \$XX per week plus a commission. The customers paid the firm. The worker indicated she was not covered under the firm's workers' compensation insurance policy. The worker stated she was not at risk for a financial loss in this work relationship. The firm established level of payment for services provided or products sold.

The firm stated that nothing was provided to the worker; the worker furnished computer, printer and whatever was needed in the classroom. The worker did not lease equipment, space, or a facility; however, she did incur expenses for gas, food, lodging, laptop, and stationery supplies in the performance of the job. If the firm was reimbursed for mileage under its contract with the school district, the worker was paid that mileage reimbursement; noting that not all schools paid mileage. The firm paid the worker a negotiated fee per day, and the fee never varied based on hours or location. The school districts paid the firm; there was no Medicaid billing involved. The worker was not covered under the firm's workers' compensation insurance policy. The firm indicated the worker was not at risk for a financial loss in this work relationship. The worker did not establish the level of payment for services provided or products sold.

Both parties concurred 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 the worker was performing same or similar services for others during the same time frame; the worker disagreed. The firm and worker acknowledge that the worker's position was eliminated; the firm noted that another staff member returned to work and that a contract was discontinued.

The firm and worker provided copy of the termination letter with reference to severance contingent upon worker returning property to the firm, and reference to the confidentiality agreement and non-compete and non-solicitation. The agreement referred to worker as a consultant and presenter and referenced a non-competition and non-solicitation for two years.

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.

A requirement that the worker submit regular or written reports to the person or persons for whom the services are performed indicates a degree of control.

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.

The firm's 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 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.