

SS-8 Determination—Determination for Public Inspection

Occupation 07ESW Enforcement/Security Workers	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 his work status as a security guard in tax year 2018, for which he received Form 1099-MISC. The worker, a student, responded to an online posting for the position. The firm's business is described as providing security work for various businesses.

The firm's response was signed by the owner. The firm's business is providing security at retail locations and residential locations. The worker was a security guard in an upscale neighborhood during the summer; in this position he checked the resident's card to confirm eligibility to use community resources, patrolled the residential neighborhood property, and opened/closed common areas.

The worker indicated he was given training and instructions from the firm's on-site supervisor. The worker would remain posted at the gated entrance at either of two neighborhood community centers during their operating hours, maintain logs of which residents entered and exited the neighborhood community center, and was responsible for unlocking and locking the gate according to their shift. The job assignments were scheduled by the supervisor. The firm determined the methods by which the worker's services were performed. Any problems or complaints encountered by the worker were directed to the firm's on-site supervisor, or the firm's owner, or the client, depending on the nature of the question or problem encountered. The worker's services were rendered at the client's location. Upon arrival at the work site, the worker would fill out an incident report listing the worker's name, shift start time, and date. The worker would unlock the neighborhood community center and check the neighborhood calendar within for scheduled events within the work site. Following this, the worker would remain posted at one of two community centers and record the information of residents who entered and exited the community centers. After two to three hours, the worker was instructed to travel to the other community center within the neighborhood and continue recording residents' information. During this time, the worker was instructed to monitor cameras for security concerns within the community center. At the conclusion of the community centers' operating hours, the worker was instructed to lock the gates at each center and patrol the neighborhood in order to record parked vehicle information and malfunctioning light sources. The worker was required to perform the services personally; any additional personnel were hired and paid by the firm.

According to the firm, the worker was not given training and instructions by the firm; the firm's client told the firm's supervisor of the expectations from the guards and this was written down and put on a clipboard. The worker's job assignments came from the site supervisor or client. The firm's site supervisor determined the methods by which the worker's services were performed. Any problems or complaints encountered by the worker were directed to the firm's site supervisor or the client for resolution, depending on the urgency. The worker's services were rendered at the client location; the site supervisor turned in the hours worked at the end of the pay period. The worker was required to perform the services personally; the hiring and paying of helpers or substitutes was responded to as 'not applicable'.

Both parties acknowledged the firm provided a uniform/security shirt to be worn during the shift and report sheets; the worker provided his shorts and shoes. The client furnished a vehicle and access key cards. The worker did not lease equipment, space, or a facility. The firm paid the worker an hourly wage. The clients paid the firm based on the contract for services. The worker was not covered under the firm's workers' compensation insurance policy. The worker was not at risk for a financial loss in this work relationship. The firm contracted with the client for the services to be performed and the rate; and, that determined the security guard pay.

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. The worker returned to school, a distance away from the location of services, and the work relationship ceased.

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.

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.

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.

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.