

**SS-8 Determination—Determination for Public Inspection**

Occupation

07ESW.5 Enforcement/Security

Determination:

☒ Employee☐ Contractor

UILC

Third Party Communication:

☒ None☐ 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 officer in tax years 2013 through 2015. The firm's business is described as a private security company.

The firm's response was signed by Lawrence Sanders, president. The firm's business is described as providing private security officers. The worker performed services as a security officer.

According to the firm, no training or instructions were given to the worker. The worker and others arranged the work assignments. Any problem or complaint was directed to someone at the client location for resolution. The worker was not required to perform the services personally. The contract states the worker would provide replacement personnel, with the client's approval. The worker was responsible for paying the substitute.

The worker indicated he was given specific training classes, written policies and procedures, and instructions. The job assignments/written schedule were determined by a supervisor. The firm, client, and employees of the client determined the methods by which the worker's services were performed. The worker responded that any problems or complaints he encountered were directed to the site supervisor or the client. The worker performed the services at the firm's client location. The worker was required to perform the services personally; he was not responsible for engaging or paying for substitutes or additional personnel.

The firm responded that nothing was provided to the worker. The firm paid the worker an hourly wage. The worker was allowed a drawing account for advances against his pay, as needed. The clients paid the firm. The worker was not at risk for a loss in this work relationship.

The worker responded that the firm provided patrol vehicles; the worker furnished his uniforms and duty equipment with the client providing computer, office space, office equipment and supplies, and radios. The worker did not lease equipment, space, or facilities and did not incur expenses in the performance of the job. He concurred that the firm paid him an hourly wage and the client paid the firm. The worker acknowledged that he was not at risk for a financial loss in this work relationship. The firm established the level of payment for services provided.

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 worker responded that he was not performing same or similar services for others during the same time frame; the firm did not know if he was or was not working elsewhere.

The worker provided: a copy of the Security Services Agreement; a copy of Security Officer Code of Conduct; security training checklist for client; Leave Request form; and, copies of the schedules and CPI shift logs.

The firm provided a copy of the Security Services Agreement which covers: procedures that indicates that all subcontractors will contact their immediate supervisors regarding all issues that come up; the firm management representative shall visit each post or patrol for the purpose of conducting in-service training, inspection of personal appearance, and administer contractor/subcontractor related matters; the addendum indicates worker understands he will receive a Form 1099-MISC; no taxes will be withheld and that he is not entering into a employee/employer relationship.

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## 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.

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.

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 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.