

SS-8 Determination—Determination for Public Inspection

Occupation

07ESW.11 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 guard at a school in tax year 2014. During a conversation, the worker acknowledged that the services have continued through the years to the present, tax year 2017.

The firm's response was signed by the controller. The firm's business is described as an alternative high school. The staff (teachers and principal) walk the students out of the building and the worker, an off-duty police officer walks the students to the bus stop. The time required is generally 1-2 hours in the afternoon. The worker (and others) are outside of the school; because, there needs to be a security presence.

It was clarified with both parties that the school did not contact or contract with the police department and the worker was not required to notify the police department of the part-time job as long as it did not interfere with his full-time employment and he was not given benefits.

The worker was not given specific training and instructions; his career training qualified him to perform the job assignment. Any problems or complaints encountered by the worker were directed to the school principal. The services are rendered at one location on a part-time basis; the worker was required to perform the services personally.

Neither party furnishes any equipment, materials, or supplies. Both parties acknowledged that the school pays the worker by the hour and issues him Form 1099-MISC at year-end. The firm and worker concur that the worker was not at risk for an financial loss in this work relationship; however, they do not agree as to which party established the hourly rate of pay. There are no benefits offered to the worker. Either party can terminate the work relationship without incurring a liability or penalty. The worker is not performing same or similar services for others during the same time frame. The worker is an off-duty officer providing security.

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.

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.

We have considered the information provided by both parties. In this case, the school retains 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 the students' safety. The fact that the worker is not closely monitored would not carry sufficient weight to reflect a business presence for the worker. In fact, many individuals are hired due to their expertise or conscientious work habits and close supervision is often not necessary. The worker is not operating a separate and distinct business; the worker does not have an investment of capital or assume business risks, and therefore, he does not have the opportunity to realize a profit or incur a loss as a result of the services provided. Integration of a worker's services into the business operations generally shows that the worker is subject to direction and control. In this case, the worker is not engaged in an independent enterprise, but rather the services performed by the worker are a necessary and integral part of the school's daily routine.

CONCLUSION

Based on the above analysis, we conclude that the school has the right to exercise direction and control over the worker to the degree necessary to establish that the worker is a common law employee, and not an independent contractor operating a trade or business.