

SS-8 Determination—Determination for Public Inspection

Occupation

09DVC.121 Driver

Determination:

☒ Employee☐ Contractor

UILC

Third Party Communication:

☒ None☐ Yes**Facts of Case**

The worker initiated the request for a determination of his work status as a driver (transporting band equipment to tour sites) and seller of mercantile items (t-shirts and CD's) in tax years 2011 through 2014. The firm's business is described as [REDACTED] band on tour.

The firm's response was signed by the business manager. The firm's business is described as handling the logistics for a touring band. The firm tours once a year, but for several months through [REDACTED]. The firm may be several months at 'home' in the recording studio. The worker performed two separate functions. The main function was as an independent driver. He arranged the hiring of a truck, a time to pick up firm's equipment and load it, and drive the equipment to the band's touring locations. The other position was that of an independent merchandise sales representative at the venues. He would arrange the sale of the merchandise, handle the set up, locate assistance, and handle all payments.

According to the firm, there was no training or instructions given to the worker. The worker determined the methods by which the services were performed and would resolve most issues/problems himself; but, if needed would contact the tour manager. It was confirmed with the firm's accountant that the worker did furnish an expense report and receipts as well as an accounting of merchandise sold and money collected. The worker did not have regular hours or a dictated routine; the worker was a driver who provided services to firm, if available. The firm indicated the worker was not required to perform services personally.

The worker responded that he was given instructions as to where to go and pick up merchandise and truck and how and what to sell at the venue. He stated the job assignments were written precise orders as to where, when and how. The firm determined the methods by which the services were performed. Any problems or complaints encountered by the worker were directed to the firm for resolution. The worker was required to perform the services personally; any additional personnel were hired and paid by the firm.

The firm leased or rented the truck(s) and equipment, and purchased the t-shirts and CD's, for sale. The worker furnished nothing; he worker did not lease equipment and did not incur expenses in the performance of the job. Costs incurred by the worker for fuel and/or lodging were reimbursed. The firm established the level of payment for services rendered or merchandise sold. The worker received the gross money from sale or merchandise, deducted his commission, and paid the net to the firm. The worker was not covered under the firm's workers' compensation insurance coverage. The firm indicated the worker was paid a daily rate and a commission on sales of merchandise and that he was allowed a drawing account per job.

Both parties concur that no benefits were extended to the worker. Either party could terminate the work relationship without incurring a liability or penalty. The firm did respond that the worker was performing same or similar services for others during the same time frame; the worker disagreed.

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.

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.

The establishment of set hours of work by the person or persons for whom the services are performed is a factor indicating control. If the nature of the occupation makes fixed hours impractical, a requirement that workers be on the job at certain times is an element of control. See Rev. Rul. 73-591, 1973-2 C.B. 337.

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.

If the person or persons for whom the services are performed ordinarily pay the worker's business and/or traveling expenses, the worker is ordinarily an employee. An employer, to be able to control expenses, generally retains the right to regulate and direct the worker's business activities. See Rev. Rul. 55-144, 1955-1 C.B. 483.

The fact that the person or persons for whom the services are performed furnish significant tools, materials, and other equipment tends to show the existence of an employer-employee relationship. See Rev. Rul. 71-524, 1971-2 C.B. 346.

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.

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.