

SS-8 Determination—Determination for Public Inspection

Occupation 02AAD.42 Designer/Artist	Determination: <input checked="" type="checkbox"/> Employee <input type="checkbox"/> Contractor
UILC	Third Party Communication: <input checked="" type="checkbox"/> None <input type="checkbox"/> Yes

Facts of Case

The worker initiated the request for a determination of his work status as a senior graphic designer in tax years 2014 and 2015. The firm's business is described as a creative marketing and design firm.

The firm's response was signed by the president. The firm's business is described as a full-service agency specializing in graphic design, web design, advertising, and marketing. The worker performed services as a freelance graphic designer.

According to the firm, the projects were explained, but no instruction as to how to complete them were given to the worker. The work assignments were offered via email or the project management platform, [REDACTED]. The firm responded that the worker determined the methods to use to perform the work assignments. Any problems would be directed to the president of the firm; however, the worker also contacted clients directly. The worker maintained his own schedule; his schedule varied day-to-day and week-to-week. The worker was not required to attend any meetings with clients. He worked from the firm location or from his home. The worker was not required to perform the services personally – he could contract out his work to others and would be required to pay any individuals that he contracted with.

The worker responded that he was given instructions in art direction, scheduling of work, training in time management programs, and time keeping programs. His job assignments came through the program [REDACTED], a project scheduling and time management program. He indicated the firm's project manager and art director determined the methods by which his services were performed and that any problems or complaints he encountered were directed to the firm for resolution. The worker stated his services were rendered 99% of the time at the firm's premises – he arrived in the morning and checked the project list, clarified any questions and then performed his duties. He indicated he was required to perform the services personally with any additional personnel being hired and paid by the firm.

The firm made available a computer for the worker at the office and noted that other contractors could use it, too; but added, that the worker had his own computer and software. The worker responded that the firm provided a computer, tablet, software, desk, and coffee/refreshments. Both parties concurred that the worker did not lease space, equipment, or facilities and did not incur expenses in the performance of his assigned work. The firm and worker agreed that the firm paid the worker an hourly wage and the clients paid the firm. The worker and firm concurred that the firm established the level of payment for services provided or products sold. Although the firm indicated the worker was at risk for an economic loss should he incur damage to his computer or vehicle or home office space, the worker disagreed, indicating he was not at risk for a financial loss in this work relationship.

The firm responded that there were no benefits extended to the worker; the worker agreed, but stated that the firm offered a 10% bonus for a client referral. Either party could terminate the work relationship without incurring a liability or penalty. The firm and worker disagreed as to whether the worker was performing same or similar services for others during the same time frame. The final product was completed under the firm's name and was submitted to the firm.

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.

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 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.