

SS-8 Determination—Determination for Public Inspection

Occupation 02COO Coordinators	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 business unit manager in tax year 2018, for which he received Form 1099-MISC. The worker stated that for tax years 2009 to 2017 he was issued Form W-2. The firm's business is described as [REDACTED] services. The worker stated there were no differences in the job since 2009.

The firm's response was signed by the manager. The firm is contractor for the installation of mobile [REDACTED] infrastructure, mainly in areas outside of the [REDACTED]. The worker provided services as a Project Manager. In this capacity, he coordinated activities between multiple contractors, other specialists and subcontracted resources and the client's own project managers on a per project basis. The business experienced a downturn in 2017 which forced a change in conditions and the choosing between change of terms or termination/closure of business. The firm responded that to avoid termination, the staff asked to be kept as contractors.

The worker stated 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 for resolution. The worker was required to submit daily, weekly, and monthly reports. His services were rendered at the firm's location from 9am to 5pm; and, he noted that he was sent on trips to search for business. 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 provided with training and/or instructions since the worker knew what to do, how to plan, and how to manage. The job assignments were a result of the firm receiving purchase orders to be executed. The master contract between the firm and the customers determined how the worker performed his job. Any problems or complaints encountered by the worker were directed to the firm for resolution if the worker could not resolve the matter. The worker's services were rendered from the firm's premises or the worker's home and occasionally on job sites. The worker was required to attend project advance meetings and relevant internal meetings. The worker was required to perform the services personally.

The firm and worker acknowledged the firm provided a computer, cellular phone, email access, and a work space as well as food and expenses incurred when traveling. The worker furnished nothing and did not incur expenses in the performance of his job. The firm paid the worker a salary; and, the customers paid the firm. 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 worker did not establish level of payment for services provided or products sold.

The worker responded that he was entitled to the benefits of sick pay, paid holidays, paid vacations, and personal days. Either party could terminate the work relationship without incurring a liability or penalty. The firm responded that the worker was not performing same or similar services for others during the same time frame; the worker disagreed. The worker stated he had a responsibility to solicit new customers and that all orders were submitted for the firm's approval. The firm indicated the worker left without notice. The worker stated the work arrangement ended when he stopped receiving compensation.

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 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

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.

Please see www.irs.gov for more information including Publication 4341 Information Guide for Employers Filing Form 941 or Form 944 Frequently Asked Questions about the Reclassification of Workers as Employees and Publication 15 (Circular E) Employer's Tax Guide.