

## SS-8 Determination—Determination for Public Inspection

Occupation

02OFF.57 Office Worker

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 receptionist, administrative, and general security in tax years 2013 and 2014. The firm's business is described as a fitness, boxing, and indoor soccer camp complex.

The firm did respond to the request for information; the firm's response was signed by [REDACTED], manager/owner. The firm's business is described as a full-service boxing gym that sells personal training, group classes, and monthly memberships. The firm rents out the soccer field for team sports and rents the gym facility to personal trainers who bring their own clientele. The worker performed services completing inventory, attempted to be a personal trainer, and performed other jobs that had a start and end. The firm indicated that the worker was initially to become a trainer but did not obtain the proper certification and the required insurance.

According to the firm, the worker was employed as an Independent Contractor; the worker was given jobs that had a start and end date (ex. taking an inventory of all gym items) – jobs that would have been outsourced. The firm would assign job tasks and allow him to complete them on his time frame; the worker would decide how to complete the task. The firm stated the worker was required to contact the firm's owner if he encountered any problems or complaints that required resolution. The firm indicated the worker would decide his own hours and report the total to the firm every week. The worker worked from his home and at the gym. The worker was to perform the services personally.

The worker responded that he was given specific training and instructions as to how to 'man' the front desk, greeting clients, and the rules to enforce, procedural and equipment training, and pricing. The job assignments came from the firm's owners; and it was the firm that determined the methods by which the worker's services were performed. The worker indicated that any problems or complaints he may have encountered were directed to the firm for resolution or they instructed worker as to how to resolve the matter. The services were rendered at firm location unless he was running errands. The worker was required to perform the services personally; any additional personnel were hired and paid by the firm.

The firm provided a place to complete tasks, if necessary. The worker provided a computer and email; the worker did not lease facilities, equipment, or space. The firm paid the worker an hourly rate for completed work; the customer paid firm.

The worker indicated that the firm provided all supplies and equipment. The worker stated he furnished nothing, did not lease equipment, and did not incur expenses in the performance of the job. He agreed he was paid an hourly wage and the customers paid the firm.

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 worker was not performing same or similar services for others during the same time frame.

The worker provided copies of emails in which the firm discusses that they cannot afford overtime and that the firm was going to draft a schedule so the worker would know his schedule in advance and that everyone will be working a max of approximately 25-29 hours.

The firm provided a copy of an unsigned agreement. The firm stated the worker was a representative of the firm and was described as such.

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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. See, for example, Rev. Rul. 68-598, 1968-2 C.B. 464, and Rev. Rul. 66-381, 1966-2 C.B. 449.

If the work is performed on the premises of the person or persons for whom the services are performed, that factor suggests control over the worker, especially if the work could be done elsewhere. See Rev. Rul. 56-660, 1956-2 C.B. 693. Work done off the premises of the person or persons receiving the services, such as at the office of the worker, indicates some freedom from control. However, this fact by itself does not mean that the worker is not an employee. The importance of this factor depends on the nature of the service involved and the extent to which an employer generally would require that employees perform such services on the employer's premises. Control over the place of work is indicated when the person or persons for whom the services are performed have the right to compel the worker to travel a designated route, to canvass a territory within a certain time, or to work at specific places as required. See Rev. Rul. 56-694, 1956-2 C.B. 694.

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.

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.

Your 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. 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.