

SS-8 Determination—Determination for Public Inspection

Occupation

04MAN.71 Manager

Determination:

☒ Employee

☐ Contractor

UILC

Third Party Communication:

☒ None

☐ Yes

Facts of Case

The worker initiated the request for a determination of her work status as an office manager. In this capacity she managed the office staff of two medical assistants, handled customer complaints, and was to see that the everyday functions of the medical office are handled as efficiently as possible. The firm's business is described as a medical practice.

The firm's response was signed by [REDACTED], MD. The firm's business is described as a medical practice. The worker performed services as a mentor to the front office staff. The firm response indicated the worker was hired on a per diem basis as an 'outside consultant'.

According to the firm, the worker was not given training or instructions and it was the worker who determined the methods by which the services were performed. The worker was present during business hours but had flexibility in her schedule. The firm responded that the worker was required to perform the services personally.

The worker agreed that no training and instructions were given since she had prior experience. The job assignments came from the firm; and it was the firm that determined the methods by which the worker's services were performed. The worker stated that any problems or complaints encountered by the worker were directed to the firm for resolution. The services were rendered at firm's location 9 a.m. to 5 p.m. Monday through Friday. She indicated that she was not required to perform the services personally; any additional personnel were hired and paid by the firm.

The firm provided brochures, folders, and marketing supplies; the worker furnished nothing. The firm stated the worker was paid an hourly wage and was reimbursed for mileage. The worker was not at risk for a financial loss in this work relationship. The firm acknowledged that the worker did not establish the level of payment for services provided or products sold.

The worker responded that the firm provided email address, office supplies and equipment and that she did not furnish anything. The worker did not lease equipment and did not incur expenses in the performance of the job. The customers paid the firm and the firm paid the worker an hourly wage. The worker indicated she was covered under the firm's workers' compensation insurance policy. The worker responded that she was not at risk for a financial loss in this work relationship and that she was not in a position to establish the level of payment for services provided or products sold.

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 indicated the worker was performing same or similar services for others during the same time frame; the worker disagreed. The worker was referred to as a representative, marketing consultant of the business. The worker relationship existed from October 2014 through March 2015.

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 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. See Rev. Rul. 55-695, 1955-2 C.B. 410.

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 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.

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.