

SS-8 Determination—Determination for Public Inspection

Occupation

02LAW.14

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 attorney from April 2013 to July 2013. The worker indicated that after a lengthy interview process, the firm offered a 1099-position instead of an associate position. The firm's business is described as law firm. The worker was issued Form 1099-MISC to report her earnings.

The firm's response was signed by a managing partner. The firm's business is described as a small litigation firm with two partners and one associate, specializing in Admiralty and Maritime law. The firm primarily represents seamen injured at sea. The worker completed an application and was engaged as a non-employee contract attorney on a 90-day trial basis at a maximum of 30 hours per week.

According to the firm, the worker had been previously employed as law clerk in the district court, was licensed by the state, and was a fully functioning independent lawyer. The firm responded that she received her work assignments from the firm orally or by email; she could accept or reject assignments. The worker was a fully licensed, qualified attorney and could determine the methods by which she performed the assignments. The worker determined her hours and where she worked from – her home or firm's office. The worker was required to perform the services personally.

The worker stated the specific instructions and job assignments were delivered by the senior attorneys of the firm and it was the firm that determined the methods by which the worker's services were performed. She responded that any problems or complaints encountered by the worker were directed to the firm for resolution. She performed her services at the firm's place of business from 8:30 a.m to 6 p.m. and was required to perform the services personally.

The firm indicated the worker was provided the desktop computer, land line telephone, and stationary supplies. The worker provided a laptop computer and cell phone; she did not lease equipment, space, or a facility. The firm paid the worker by the hour for piecework assignments; the clients paid the firm. The firm acknowledged the worker was covered under the firm's workers' compensation insurance policy and that the worker did not establish the level of payment for services provided.

According to the worker, the firm provided computer, office equipment, furnishings, and supplies. She confirmed that she provided nothing; she did not lease equipment, space, or a facility and did not incur expenses in the performance of the job. The worker indicated the firm reimbursed for bar dues, continuing education expenses, and professional organization membership. The firm paid her an hourly wage; the clients paid the firm. The worker stated worker was not at risk for a financial loss in this work relationship. The worker indicated it was the firm that established the level of payment for services provided.

The worker indicated that the benefits extended to her included malpractice and health insurances. 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 firm did not respond to the benefits available to the worker, but, did respond that the worker had the option to do legal work at home. She was represented as a contract part-time lawyer. The work relationship ceased when the firm stopped giving her assignments.

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.

Lack of significant investment by a person in facilities or equipment used in performing services for another indicates dependence on the employer and, accordingly, the existence of an employer-employee relationship. The term "significant investment" does not include tools, instruments, and clothing commonly provided by employees in their trade; nor does it include education, experience, or training. Also, if the firm has the right to control the equipment, it is unlikely the worker had an investment in facilities. 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 clients' 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.