

SS-8 Determination—Determination for Public Inspection

Occupation 02AAD Virtual Assistant & Graphic/Web Designer	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 submitted a request for a determination of worker status in regard to services performed for the firm from 2016 into 2018 as a virtual assistant and graphic/web designer. The services performed included assisting in creating collateral for various media (social, print, educational, marketing, etc.); designing and creating websites for the firm's clients; helping with the firm's website. The firm issued the worker Form W-2 for 2016; tax reporting documents were not issued for 2017 or 2018. The worker filed Form SS-8 as she received Form W-2 in 2016 and was then reclassified as a contractor in 2017; however, the duties performed didn't change (but the location where she performed services did change, i.e. in-office versus remotely). She also was unable to obtain a 2017 tax reporting document.

The firm's response states its business is wellness program creation. The worker was engaged as a graphic designer. The worker was classified as an independent contractor as she agreed to work as a contractor, requested an increase in pay to live and work whenever and wherever, and invoiced for work performed.

The firm stated it did not provide the worker specific training or instruction. The worker received work assignments as requested by email or through an online platform. The worker determined the methods by which assignments were performed. If problems or complaints arose, the worker could contact the firm, customer service, or another worker. Reports included invoices and time verifications. Invoices provided for our review document the worker performed services on a regular, recurring basis. Work hours were allocated to specific projects including administrative time, meetings, and support of the firm's business, in addition to other projects. The firm wasn't aware of the worker's daily routine or schedule as she worked all hours. When she stopped completing work, she was replaced. It is unknown where the worker performed services; however, presumed to be her home, parent's home, etc. Meetings were not required. The firm did not require the worker to personally perform services. The worker was responsible for hiring and paying substitutes or helpers. The worker stated that when working with the firm's clients, the firm provided her specific project instructions. The firm provided work assignments, determined the methods by which assignments were performed, and assumed responsibility for problem resolution. Reports included daily detailed reports on projects worked. Her routine consisted of checking emails, attending mandatory meetings, and working on client tasks, while using mandatory tracking software provided by the firm. Services were performed during business hours, five days per week. The remote work was performed from her home. Meetings included regular staff meetings and one-on-one meetings with the firm's president. The firm required she personally perform services. The firm was responsible for hiring and paying substitutes or helpers.

The firm stated it did not provide supplies, equipment, or materials. It is unknown what the worker provided. It is unknown if the worker leased equipment, space, or a facility. It is unknown if the worker incurred expenses in the performance of services for the firm. The firm did not reimburse the worker for any expenses incurred. The firm paid the worker as invoiced; a drawing account for advances was not allowed. The firm did not carry workers' compensation on the worker. The worker's economic loss or financial risk related to no salary. The worker established the level of payment for the services provided. The worker stated the firm provided various computer software and a juicer for videos. She provided a computer. She did not lease equipment, space, or a facility. She incurred the unreimbursed expense associated with Internet. Customers paid the firm. The firm paid her an hourly rate of pay. She was sometimes paid through PayPal and sometimes was mailed a check by the firm. The firm established the level of payment for the services provided.

The firm stated the work relationship could be terminated by either party without incurring liability or penalty. It is unknown if the worker performed similar services for others or advertised. The firm represented the worker as a contractor to its customers. The firm terminated the work relationship. The worker stated she did not perform similar services for others or advertise as she worked full-time for the firm. The firm represented her as an employee to its customers. Services were performed under the firm's business name.

Analysis

Generally, the relationship of employer and employee exists when the person for whom the services are performed has the right to control and direct the individual who performs the services, not only as to what is to be done, but also how it is to be done. It is not necessary that the employer actually direct or control the individual, it is sufficient if he or she has the right to do so.

Section 31.3121(d)-1(a)(3) of the regulations provides that if the relationship of an employer and employee exists, the designation or description of the parties as anything other than that of employer and employee is immaterial. Thus, if an employer-employee relationship exists, any contractual designation of the employee as a partner, coadventurer, agent, or independent contractor must be disregarded.

Therefore, the firm's statement that the worker was an independent contractor pursuant to a verbal 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. Furthermore, whether there is an employment relationship is a question of fact and not subject to negotiation between the parties.

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 services performed by the worker were integral to the firm's business operation. The firm provided work assignments by virtue of the customers served, required the worker to report on services performed as evidenced on the invoices provided, and ultimately assumed responsibility for problem resolution. These facts evidence the firm retained the right to direct and control the worker to the extent necessary to ensure satisfactory job performance in a manner acceptable to the firm. Based on the worker's education, past work experience, and work ethic the firm may not have needed to frequently exercise its right to direct and control the worker; however, the facts evidence the firm retained the right to do so if needed.

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. In this case, the worker did not invest capital or assume business risks. 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. As the worker presumably used her personal computer and Internet for personal needs, these items are not considered a significant business investment. Based on the hourly rate of pay arrangement the worker could not realize a profit or incur a loss.

Factors that illustrate how the parties perceive their relationship include the intent of the parties as expressed in written contracts; the provision of, or lack of employee benefits; the right of the parties to terminate the relationship; the permanency of the relationship; and whether the services performed are part of the service recipient's regular business activities. 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. Both parties retained the right to terminate the work relationship at any time without incurring a liability. There is no evidence to suggest the worker performed similar services for others as an independent contractor or advertised business services to the general public during the term of this work relationship. The classification of a worker as an independent contractor should not be based primarily on the fact that a worker's services may be used on a temporary, part-time, or as-needed basis. As noted above, common law factors are considered when examining the worker classification issue.

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.

The firm can obtain additional information related to worker classification online at www.irs.gov; Publication 4341.