

SS-8 Determination—Determination for Public Inspection

Occupation 02AAD Architects, Artists, and Designers	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 August 2019 to December 2019 as an associate designer. The firm issued the worker Form 1099-MISC for 2019. The worker filed Form SS-8 as they believe they received Form 1099-MISC in error because the firm supervised the worker during their job duties. The worker provided copies of time sheets, an employment agreement between the parties, and job offer letters.

The firm's response states it is a tech-driven interactive design agency. The work provided by the worker was 3d art and graphics. The worker was requested to provide design services. The firm provided copies of the employment agreement, offer letters, job requirements, and a letter to our department. The firm voluntarily agrees that the worker should have been considered as an employee of the firm, thus complying with an employee determination.

The firm states that the worker was managed by the firm's creative director. This creative director trained the worker and gave the worker instructions several times a week. The worker received job assignments from the creative director along with the firm's producers. Assignments were also given through the firm's [REDACTED]. The creative director determined the methods by which job assignments were performed and was responsible for problem resolution. The worker did not provide the firm with any reports. The worker would check in with the firm in the morning and perform tasks based upon project objectives. The worker performed services on-site at the firm's location. The worker was not required to be a part of any meetings but reported directly to the firm's creative director. The worker was not required to personally perform services. The worker was not allowed to hire subs, and the creative director would be responsible for hiring any help needed. The firm would pay any additional help. The worker states that they shadowed a senior designer of the firm and was trained by them. The worker received job assignments through daily meetings and they would accomplish tasks that were assigned to them. The firm's supervisor and team determined the methods by which these tasks were performed and assumed responsibility for problem resolution. The worker was required to provide the firm with a weekly time sheet, of which they attached examples. They also were required to complete an end of year employee self-review for the firm. The worker provided services during flexible 6 to 8 hours shifts on Monday through Friday. The worker provided all services at the firm's premises. The worker was required to attend daily project standups, monthly meetings, and team meetings. There were no penalties for not attending, as long as they were able to complete their tasks. The worker was required to perform services personally and could not hire or pay any substitutes, which was the responsibility of the firm.

The firm states that they provided the worker with an [REDACTED] computer and monitor. The worker did not provide anything and did not have to lease any space, facilities, or equipment. The worker did not have any expenses. The worker was paid an hourly wage by the firm and did not have access to a drawing account for advances. Customers of the firm paid the firm. The firm did not carry worker's compensation insurance on the worker. There were no economic losses or financial risks faced by the worker. The worker set the level of payment for services rendered. The worker states that the firm provided the computer, software licenses, notepads, monitors, and snacks and food for the worker. The worker provided nothing for their job duties. The firm took on all job-related expenses. Travel and lunch expenses were reimbursed by the firm. The worker was paid an hourly wage on a biweekly basis. Customers paid the firm, and the firm determined the hourly wage for the worker upon the start of employment. The worker did not have any exposure to financial loss.

The firm states that they did not provide the worker with any benefits. The work relationship could be terminated by either party without liability or penalty. The worker did not perform similar services for other firms during the work relationship. The worker was not a member of a union and did not advertise their services to the public. The firm states that the worker was not client-facing and therefore there was no representation made. The firm states that they did represent the worker as part of their team on their website. The firm states that the work relationship ended when the contract ended. The firm provided an offer letter to demonstrate this contract. The offer letter mentions that the work relationship could become permanent and the worker could be offered benefits depending upon performance and business needs at the time. This offer letter also mentions the hourly wage, job description and expectations. The firm also provided an offer of contract extension letter in which they offer the worker benefits and mention the work requirements and expectations. The firm provided a copy of the contract which included a non-compete clause. The firm states in an attached letter that they believe the worker was treated as an employee and that they are responsible for their portion of the employment taxes, thus voluntarily reclassifying the worker. The worker states that they were provided with a holiday bonus. The worker provided a copy of the employment agreement which states job responsibilities as well as the non-compete agreement between the parties. The worker was not a member of a union and did not advertise their services to the public. The worker was let go after the firm decided not to renew the contract.

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, a statement that a worker is an independent contractor pursuant to a written or 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.

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. In this case, the firm required the worker to personally perform services. Furthermore, the services performed by the worker were integral to the firm's business operation of design. The firm provided work assignments by virtue of the customers served, required the worker to report hours worked with time sheets, and 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, day, 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. The firm provided all supplies, materials, and equipment needed for the worker's job duties. 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.