

SS-8 Determination—Determination for Public Inspection

Occupation 02ABT Accountants/Bookkeepers/Tax Preparers	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 June 2017 to December 2017 as an accountant. The firm issued the worker Form 1099-MISC for 2017. The worker filed Form SS-8 as they believe they received Form 1099-MISC in error. The worker feels that they were an employee of the firm because the firm provided all of the equipment and supplies necessary to do the job as well as provided supervision and direction regarding job duties.

The firm's response states it provides automotive lighting and assembly. The work provided by the worker was that of a bookkeeper. The worker was requested to provide bookkeeping tasks for the current tax year. The firm states that the worker was an independent contractor who signed a contract with the firm for a six month period. The contract was not provided for our review.

The firm states that the worker received no training or instruction from the firm. The firm states that the worker was responsible for accounts receivable and accounts payable filings as well as accounting monthly reports. The firm states that the worker determined the methods by which assignments were performed. If problems arose during job responsibilities, the worker was required to contact the firm's owner. The worker was required to submit monthly accounting reports as well as invoicing, accrual, and sales reports. The worker would follow security to access the firm's computer server from Monday through Friday from 8 a.m. until 5 p.m. The worker was required to provide services personally and helpers or substitutes were not applicable to the work relationship. The worker states that they were shown how to process orders for the firm as well as journal entries and production reports. The worker states that they received work assignments directly from the owner and that the owner determined the methods by which job tasks were performed. If problems arose during job responsibilities, the worker was required to contact the firm's owner. The worker states that they would receive orders via email or fax, and then they would process those orders on the firm's accounting software. The worker states that the job responsibilities were performed at the firm's office location. If helpers or substitutes were required, the firm would be responsible for hiring and paying them.

The firm states that they provided the worker with access to the server, and the worker only had to provide their knowledge. The worker did not have to lease facilities, space, or equipment. The firm states that no expenses were incurred by the worker in the performance of their job duties. The firm states that the worker received a fixed compensation with no access to a drawing account for advances. The customer would pay the firm, and the firm set the level of payment for services rendered. The firm states that the worker did not have any exposure to economic loss or financial risk while working for the firm. The firm did not carry worker's compensation insurance on the worker. The worker states that the firm provided office supplies and equipment for their job responsibilities, and the worker did not have to provide any equipment or supplies. The worker states that they earned an hourly wage and did not have access to a drawing account for advances. The worker did not have any expenses or financial risk when working for the firm.

The firm states that they did not offer the worker any benefits. The work relationship could be terminated at any time without incurring any financial loss or liability. The firm states that the worker did not perform similar services for any other firm, and that the worker did not advertise their services to the public. The worker was not a member of a union. The firm states that the worker signed a contract agreement for a specific amount of time to offer the firm accounting and bookkeeping services but did not provide a copy of the contract. The firm states that the work relationship ended when the contract ended. The worker states that they were an hourly employee and that someone else was hired to fill in the position that they vacated. The worker states that the work relationship ended when they were fired from the firm. The worker states that there was a proprietary protection agreement in place to protect the firm's designs, etc. The worker did not provide similar services to other firms at the time they worked for the firm. The worker states that they were represented as an employee under the firm's 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, 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. The firm provided work assignments by virtue of the customers served, required the worker to report on services performed through a variety of reports, 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. Based on the hourly 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.