

SS-8 Determination—Determination for Public Inspection

Occupation

02ADM Administrators

Determination:

☒ Employee☐ Contractor

UILC

Third Party Communication:

☒ None☐ 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 payer from May 2015 to April 2016 as an administrative assistant and treasurer. The services performed included assisting the chair of the organization in daily business and special event efforts. The payer issued the worker Form 1099-MISC for the years in question. The worker filed Form SS-8 as she believes she erroneously received Form 1099-MISC. Services were performed under a written agreement.

The payer's response states it is a non-profit organization which raises money for a hospital by hosting fundraisers. The worker was engaged as an assistant. The work done by the worker included creating newsletters, flyers, and posters for events, in addition to helping arrange events and sending out correspondence. The worker was classified as an independent contractor as she signed a contract as a 1099 contractor. She received little to no supervision, had no set hours, and did her work at home. Services were performed under a written agreement; however, a copy was not available for our review.

The payer stated it granted the worker access to its database so she could send out emails and newsletters. The worker met with the payer's chair if she had questions. Work assignments were repetitive items, such as the monthly newsletter, which she created on her own time. The worker determined the methods by which assignments were performed. The (volunteer) chair of the board was contacted if problems or complaints arose and assumed responsibility for problem resolution. Reports were not required. The worker had no daily routine and no scheduled hours. She would occasionally call with questions. Services were performed in the worker's home. She was encouraged to attend 11 board meetings per year; however, there was no penalty if she was unable to attend. The payer did not require the worker to personally perform services. Hiring substitutes or helpers was not applicable. The worker stated the payer provided her past records and files to review and replicate. The chair of the board provided work assignments, determined the methods by which assignments were performed, and assumed responsibility for problem resolution. Reports included board meeting minutes. The worker's daily routine was flexible to the point of the needs of the chair, board, or other committee meeting or event. It was mandatory for her to be on location at events. Services were performed at board meetings, at the chair's home, on site at organization events, and at the worker's home. The payer required her to attend all board and committee meetings. The payer required her to personally perform services.

The payer stated it provided the worker paper and ink. The worker provided her own computer and printer. The worker did not lease equipment, space, or a facility. She did not incur expenses in the performance of services for the payer. Customers paid the payer. The payer paid the worker an hourly rate of pay; a drawing account for advances was not allowed. The payer did not carry workers' compensation insurance on the worker. The worker did not incur economic loss or financial risk. The board of directors established the level of payment for the services provided. The worker stated the payer also provided all office supplies, computer software, and all materials for events. She tracked her hours and submitted them to the payer for payment purposes.

The payer stated benefits were not provided. The work relationship could be terminated by either party without incurring liability or penalty. The worker did not perform similar services for others. There was no agreement prohibiting competition between the parties. Items prepared by the worker at home were given to the payer for distribution. The payer represented the worker as an assistant (contractor) to its customers. The work relationship ended when the contract ended and it was not renewed. The worker stated she did not advertise. The payer represented her as an employee to its customers. Services were performed under the payer's organizational name. The payer terminated the contract and a separation agreement established the terms of separation.

The signed service agreement, provided by the worker, documents, in part, she would be paid an hourly rate of pay and she would invoice the payer by the third Thursday of each month. The invoice would report, at a minimum, the main activities and accomplishments and the hours expended. The agreement would remain valid for three years unless terminated by the worker or payer. Neither party could assign or transfer the agreement without the prior written consent of the non-assigning party. The payer's letter of [REDACTED], provided 14-day notice to the worker regarding the need to terminate the contract. During the 14-day period the worker would have the opportunity to remediate issues and to discuss the remediation with the committee. If the committee felt there were too many issues remaining, the contract would be terminated. An issue identified by the payer included the worker not meeting expectations outlined in a prior meeting. On [REDACTED], the payer signed a separation agreement terminating the agreement effective immediately. The payer offer the worker a severance payment upon the worker's compliance with the terms of the agreement and provided the worker did not revoke the agreement.

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 payer's statement that the worker was an independent contractor pursuant to a written 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 administrative support services performed by the worker were integral to the payer's organizational business needs. The payer provided work assignments, required the worker to report on tasks performed and hours worked, and ultimately assumed responsibility for problem resolution. These facts evidence the payer retained the right to direct and control the worker to the extent necessary to ensure satisfactory job performance in a manner acceptable to the payer. Based on the worker's education, past work experience, and work ethic the payer may not have needed to frequently exercise its right to direct and control the worker; however, the facts evidence the payer 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 payer 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 payer 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 acknowledged by the payer, the worker did not incur economic loss or financial risk. 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 payer's organization. It appears 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 payer 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 payer can obtain additional information related to worker classification online at www.irs.gov; Publication 4341.