

SS-8 Determination—Determination for Public Inspection

Occupation

02COM Communications Workers

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 firm in 2018 and 2019 as a remote researcher. The services performed by the worker included gathering past election results, through phone calls and on-line research, to determine which positions would be up for election in future years; entering relevant information into spreadsheets; gathering specific information related to filing information; checking the accuracy of other researchers' work; working on other projects as they came up. The firm issued the worker Form 1099-MISC for 2018 and 2019. The worker filed Form SS-8 as she believes she erroneously received Form 1099-MISC.

The firm's response states its business is to create voter guides to help voters vote informed on their entire ballot. The worker was hired as a remote researcher to help gather information from on-line sources about the positions up for election in 2019 and 2020. The worker used her own equipment and determined when, where, and how to perform the research. The firm provided recommended best practices for research but did not mandate required procedures or methods. The worker was not reimbursed for business expenses and did not receive benefits. The worker was hired on a per project basis and was paid per item of research.

The firm stated it has an on-line information source explaining how the project sheet is set up, goals of the project, and types of election information to gather. The worker referred to this source if questions arose. A project lead assigned a state to the worker. The worker claimed various counties to research based on her availability. The firm recommended best practices but didn't mandate them. The worker determined the methods by which assignments were performed. The project lead, a firm-employee, was contacted if problems or complaints arose. The project lead was responsible for resolution. The worker filled out a payment tracking form each day to log hours worked. The worker determined when she worked and how many total hours. It is unknown where the worker performed services. The worker was not required to attend meetings. The firm did not require the worker to personally perform services. The worker could hire and would pay substitutes or helpers. The worker stated the firm provided on-line training materials that explained the project goal, information to gather, where and how to find the information, and how to format information in spreadsheets. The firm determined the methods by which assignments were performed. Reports included various spreadsheets. Her routine was flexible but she typically worked from 11 am to 4 – 5 pm. Services were performed in the worker's home, 75% of the time, and at the library, 25% of the time. The firm required she personally perform services. Hiring substitutes or helpers was not applicable.

The firm stated it did not provide supplies, equipment, or materials. The worker provided and incurred the expense associated with a laptop, Internet, and cell phone. The worker did not lease equipment, space, or a facility. Customers paid the firm. The firm paid the worker piece work; a drawing account for advances was not allowed. The firm did not carry workers' compensation insurance on the worker. The firm established the level of payment for the services provided. The worker could have requested more if research was particularly difficult. The worker stated the firm provided training materials, an on-line communication platform, and company email account. She did not incur expenses in the performance of services for the firm. The firm paid her an hourly rate of pay. She did not incur economic loss or financial risk.

The firm stated the work relationship could be terminated by either party without incurring liability or penalty. The worker performed similar services for others; the firm's approval was not required for her to do so. There was no agreement prohibiting competition between the parties. The worker advertising was not applicable. The firm represented the worker as a remote researcher to its customers. Services were performed under the firm's business name. The worker stated the benefit of bonuses was made available to her. She did not perform similar services for others or advertise.

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.

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 research services performed by the worker were integral to the firm's business operation. The firm recommended best practices and provided an on-line information source to document how the work was to be performed; required the worker to report the results of the research performed and the daily number of hours worked; 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.

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. "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. 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 laptop, Internet service, and cell phone for personal needs they are not considered a significant business investment. Based on the piece work or 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.