

SS-8 Determination—Determination for Public Inspection

Occupation 02COM Communications Workers	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 tax year 2017 to 2019 as a verbatim hearing reporter. The work done by the worker included making audio recordings and partial verbatim notes or summary of proceedings. The firm issued the worker Form 1099-MISC for the years in question. The worker filed Form SS-8 as he believes IRS regulations define him as an employee.

The firm's response states it specializes in content development and marketing. The worker was engaged as a verbatim hearing reporter. The work done by the worker included recording hearings for [REDACTED] taking notes on the computer, and completing paperwork required by [REDACTED]. The worker was classified as an independent contractor as the firm did not provide the worker training, instructions, or tools/materials. The worker determined when, where, and how the work was done, i.e. determined his own schedule. The worker was paid a flat fee on assignment completion and he could work for multiple entities.

The firm did not provide specific training/instruction to the worker. The worker chose which days he would work by selecting hearing dates, i.e. work assignments. The worker determined the methods by which the assignments were performed within the guidelines set by [REDACTED]. If problems or complaints arose, the worker contacted the onsite [REDACTED] staff and the [REDACTED] staff was responsible for resolution. The worker's daily routine was unknown. Services were performed at hearing locations, set by [REDACTED]. The worker was not required to attend meetings. Reports were required by the worker. The firm required the worker to personally perform services. Hiring substitutes or helpers was not applicable.

The firm did not provide supplies, equipment, or materials. The worker provided office supplies. The [REDACTED] provided a computer, paperwork, headset, and fax machine. The worker did not lease any equipment, space, or a facility. All travel expenses incurred by the worker were reimbursed by the firm. Customers paid the firm. The firm paid the worker a flat rate per hearing; a drawing account for advances was not allowed. The firm did not carry workers' compensation insurance on the worker. The worker could experience loss or financial risk as he was paid a fixed amount per hearing, regardless to the length of the hearing. All prices were fixed in advance and determined/set by [REDACTED].

The firm provided no benefits to the worker. The work relationship could be terminated without liability or penalty. The worker did perform similar services for others; the firm's approval was not required for him to do so. There was no agreement prohibiting competition between the parties. The work relationship ended when the job was completed.

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 services performed by the worker were integral to the payer's business operation. The payer provided work assignments by virtue of the clients served. 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.

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. Based on the per hearing or piece work 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 advertised business services to the general public during the term of this work relationship or that the firm subcontracted its scope of work to the worker in connection with services performed. 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.