

SS-8 Determination—Determination for Public Inspection

Occupation 02COM Communication 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 is seeking a determination of worker classification for services performed as a writer for the firm from April 2018 until March 2020. The worker received a 1099-MISC from the firm for 2018 and 2019, and a 1099-NEC from the firm for 2020. The worker feels that they were misclassified by the firm as an independent contractor because they received vacation time, were paid a monthly salary, worked under supervision, attended meetings, the firm procured clients, and the firm edited the worker's content. The worker's job duties were essential to the firm's business. The worker attached a contract between the parties, screenshots of their scheduled meetings, and samples of training slides used by the firm.

The firm states that it specializes in messaging optimization for healthcare industry marketing using a combination of behavioral science and artificial intelligence. The worker was requested to provide message writing services. The firm classified the worker as an independent contractor because the worker was a freelance writer who determined when, where, and how services were performed. The firm did not supply the worker with any office space, equipment, or supplies. The firm attached a copy of the contract between the parties.

The firm states that the worker was provided with the firm's expectations for writing assignments. The worker was notified of available project work by the firm's project scheduler. The worker could accept or refuse any assignment and determined how job tasks were performed. The worker could reach out to the firm's project manager for questions and problem resolution. The worker was required to provide the firm with monthly invoices for services performed. The worker determined their own schedule and could provide services wherever they chose as the firm did not provide the worker with any workspace. There were no meetings required and the firm required the worker to personally perform services. Helpers and substitutes were not applicable. The worker states that the firm trained them in heuristic science and writing procedures. The worker attended monthly writer trainings to further understanding and was also trained on google sheets and attended weekly meetings for updates. The firm's manager assigned the worker writing assignments which would later be sent back to the firm for editing. The firm's manager and PF lead determined how jobs were performed and would be the contacts for any problem resolution. The worker provided the firm with communal google sheets and monthly invoices to collect salary. The worker's weekly routine would begin with a Monday company meeting. The worker was required to have a company email and to reply to emails immediately during business hours. The worker would receive assignments and deadlines from the firm's PF lead. The worker completed work on the communal google sheets, which were edited by the PF lead. All work was performed during business hours, Monday through Friday, either at the firm's office or the worker's home. The worker was required to attend weekly company meetings and writer trainings and would have been contacted by the firm's manager if they missed any meetings. The worker was required to personally perform services.

The firm states that it provided nothing, and the worker provided all necessary equipment, materials, and property. The firm was unaware of any lease or expenses incurred by the worker. The firm paid the worker an hourly wage up to 40 hours weekly, with no access to a drawing account. Customers paid the firm for services provided. The firm did not carry worker's compensation insurance on the worker. The worker faced no economic loss or financial risk. The firm established the level of payment for services provided. The worker states that the firm provided clients, existing ideas, advertising materials, and platforms to do work. The worker provided a computer and a written copy for PF lead to then edit. The worker did not lease any space, facilities, or equipment. The worker had their own home office costs and computer expenses. The worker was paid salary by the firm. The worker had a concern over using their own computer to perform work, which could potentially lead to a financial loss. The firm set the prices for all services provided to clients with which they contracted.

The firm states that the worker negotiated with the firm for 2/3 of a day off each month as a benefit halfway through the work relationship. The relationship could be terminated by either party without liability or penalty. The worker performed similar services for other firms and did not need approval from the firm. The worker did not advertise their services to the public. The firm did not represent the worker to its customers. The work relationship ended when the worker's services were no longer needed. The worker states that the firm offered paid vacations, sick pay, and paid holidays as benefits. The worker did not perform similar services for other firms. There was a confidentiality 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 terminated when they questioned the firm about contract legality.

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, 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. The firm provided final edits on the worker's writing assignments. 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 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 firm offered the worker paid time off as a benefit. 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.