

SS-8 Determination—Determination for Public Inspection

Occupation

Business/Computer Services/Office/Sales

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 connection with services performed for the firm from May 2019 to January 2021 as a customer service worker. The services performed included online chats and communications via email and Facebook with the firm's customers; running personal errands for the firm's owner; packaging items in the firm's warehouse and helping with inventory. The firm issued the worker Form 1099-MISC for 2019 and 2020. The worker filed Form SS-8 as she believes she received Form 1099-MISC in error.

The firm's response states its business is the design and manufacturing of camera bags. The worker was engaged to perform chat and customer service. If needed, the worker came in to help pack boxes.

The firm stated it did not provide the worker specific training. The worker was expected to logon and perform online customer service. The worker determined the methods by which assignments were performed. If problems or complaints arose, the firm was contacted and assumed responsibility for resolution. Reports and meetings were not required. The worker's routine consisted of logging on. She could perform services from her computer or cell phone. Services were typically performed at the worker's home. On occasion, she would stop into the firm's warehouse. The firm required the worker to personally perform services. Hiring substitutes or helpers was not applicable. The worker stated the firm provided her specific training related to chat line and email etiquette. The firm provided instruction and work assignments via online messenger. The firm determined the methods by which assignments were performed. Reports were not typically required; however, progress and achievement reports were expected to be provided if they came up. Errors were discussed via online messenger. Her routine consisted of chat line and email services on Monday through Friday, 9 am to 5 pm. Weekend hours were required for special events. She initially worked at the warehouse five days per week; it was then decreased to Monday, Wednesday, and Friday. Services were primarily performed at the firm's home, where she resided, and the firm's warehouse. Terms of housing included performing services for the firm. She was required to attend online and in-person meetings as scheduled by the firm.

The firm stated it did not provide supplies, equipment, or materials. The worker provided her own phone and computer. The worker did not lease equipment, space, or a facility. The worker did not incur expenses in the performance of services for the firm. Customers paid the firm. The firm paid the worker salary; 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 products sold. The worker stated the firm provided the warehouse computer, printer, paper, packing materials, all products sold, software for chat line, online store, and shipping. She leased the firm's home. If the work relationship ended, then the housing lease terminated as well.

The firm stated the benefit of personal days was made available to the worker. The work relationship could be terminated by either party without incurring liability or penalty. The worker did not perform similar services for others or advertise. Services were performed under a nondisclosure agreement. The firm represented the worker as a customer service chat person to its customers. The firm ended the work relationship due to performance issues. The worker stated the firm provided her the benefit of work trips. The firm represented her as an employee to its customers. Services were performed under the firm's business 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 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, 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. As acknowledged by the firm, the worker did not incur expenses in connection with services performed. Based on the salary 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. 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.