

SS-8 Determination—Determination for Public Inspection

Occupation

02CON Consultants

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 firm is in the business of manufacturing, selling, and servicing coding, printing, and laser marking equipment as well as accessories and supplies. The worker was engaged to provide product service support and responded to off-hour customer support calls. He received a Form 1099-MISC for his services in 2006 through 2018. Previously, the worker had been an employee of the firm for approximately sixteen years as a Customer Service Engineer for which he received Form W-2 for each year. Upon being re-hired, he was provided with a written Consulting Agreement outlining a new work relationship.

The firm provided some training on call logging software and technical product training. The worker's work assignment remained the same for over eleven years with only minor changes via the phone and email; overnight phone calls were routed to the worker. According to the worker, the firm determined the methods by which the assignments were performed and would be contacted if any issues or problems arose. The firm noted that the worker determined the methods but agreed that the firm's Senior Technical Support Manager resolved any issues. The worker submitted reports into the firm's database. Prior to that database, he logged all phone calls and customer information; then emailed that information on every Monday. Both parties agreed that the worker was on call for overnight set scheduled during the week and then from Friday evening to Monday morning. He provided technical support to the firm's customers from his home. The firm noted that attendance at meetings was not required. Both parties agreed that the worker was required to provide the services personally.

Both the firm and the worker agreed that the firm provided the laptop, cell phone, testing equipment, printers for troubleshooting and many manuals. The worker incurred travel expenses for training for which he was reimbursed. The worker was paid a set, pre-determined weekly pay and had no other economic risk. The firm basically agreed indicating that the worker was paid a lump sum. Both parties agreed that the customer paid the firm. Each indicated that the other party determined the level of payment for services.

There were paid holidays and vacation, supported by attached documents though the firm noted that there were no benefits. The firm indicated that either party could terminate the relationship without incurring a liability. The worker mentioned a two-week notice of termination required by the contract. The worker did not perform similar services for others. Both parties agreed that he represented the firm. Both also agreed that the relationship ended when the firm ended the contract.

Analysis

In determining whether an individual is an employee or an independent contractor under the common law, all evidence of both control and lack of control or independence must be considered. The relationship of the worker and the business must be examined. Facts that show a right to direct or control how the worker performs the specific tasks for which he or she is hired, who controls the financial aspects of the worker's activities, and how the parties perceive their relationship should be considered. As is the case in almost all worker classification cases, some facts point to an employment relationship while other facts indicate independent contractor status. The determination of the worker's status, then, rests on the weight given to the factors, keeping in mind that no one factor rules. The degree of importance of each factor varies depending on the occupation and the circumstances.

Factors that illustrate whether there is a right to control how a worker performs a task include training and instructions. In this case, the firm retained the right to change the worker's methods and to direct the worker to the extent necessary to protect its financial investment. The firm did provide some initial training regarding the worker's after hours tech support position. In fact, an update to those procedures was provided as supporting documentation. Training a worker by requiring an experienced employee to work with the worker, by corresponding with the worker, by requiring the worker to attend meetings, or by using other methods, indicates that the person or persons for whom the services are performed want the services performed in a particular method or manner. Though the worker performed these services at his home, he had specific set scheduled hours to be on-call for technical support issues. The establishment of set hours of work by the person or persons for whom the services are performed is a factor indicating control. If the nature of the occupation makes fixed hours impractical, a requirement that workers be on the job at certain times is an element of control.

In addition, the fact that the worker worked from home did not automatically indicate that he was self-employed. Work done off the premises of the person or persons receiving the services, such as at the office of the worker, indicates some freedom from control. However, this fact by itself does not mean that the worker is not an employee. The worker provided his services on a continuous basis throughout the time period involved. A continuing relationship between the worker and the person or persons for whom the services are performed indicates that an employer-employee relationship exists.

Factors that illustrate whether there is a right to direct and control the financial aspects of the worker's activities include significant investment, unreimbursed expenses, the methods of payment, and the opportunity for profit or loss. In this case, the worker did not invest capital or assume business risks, and therefore, did not have the opportunity to realize a profit or incur a loss as a result of the services provided. The firm provided the equipment and items that the worker needed to provide his services. He was paid a set amount per week and had no other economic risk. 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.

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. There were benefits and there a written agreement provided. Documentation was provided indicating that the worker was paid for vacation and holiday time. In addition, the firm's belief that the worker was an independent contractor pursuant to an 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. The worker was engaged to provide overnight technical support services for the firm's operation, which included providing services for its manufactured products. When doing so, the worker was not engaged in a separate business venture. The fact that he worked for the firm from his home, was not supervised daily, and presented a statement/invoice in order to receive his weekly pay, did not make him self-employed. 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.

Based on the above analysis, we conclude that the firm had the right to exercise direction and control over the worker for the entire work relationship to the degree necessary to establish that the worker was a common law employee and not an independent contractor operating a trade or business.

Please see Publication 4341 for guidance and instructions for firm compliance.