

SS-8 Determination—Determination for Public Inspection

Occupation

02CON Consultant

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**

It is our usual practice in cases of this type to solicit information from both parties involved. After the worker's initial filing of the Form SS-8, Determination of Worker Status for Purposes of Federal Employment Taxes and Income Tax Withholding, we requested information from the firm concerning this work relationship. the firm provided information in regard to this work relationship by completing Form SS-8.

From the information provided the firm is a consulting service providing assistance with the preparation and application process to high school seniors, graduate students, and college students. The worker was engaged by the firm under a written agreement from October 2017 to September 2018 as a consultant on a part-time basis. The firm states the worker was only assigned two (2) students whom he worked with one of the two students only signing a partial package for services. The worker's services included editing essays and answering basic questions from the students. The firm believes the worker was an independent contractor (IC) while performing services for them because he performed services on a part-time basis, he was contracted to help for less than 20% of time of a full-time employee, he was not required to report to their office, and the worker in this case actually worked less than 5% of full-time services. The firm reported the worker's earnings on Forms 1099-MISC.

The firm's academic manager provided training to the worker via materials and calls. Once the students were assigned to the worker, the worker responded to student work. The firm states their manager may ask the worker to prioritize certain tasks as it relates to students. The firm states the worker was responsible for how he completed his assignments. The worker was required to notify the firm's academic manager if any problems or complaints arose for their resolution. The worker did not have a set daily routine. The worker was required to personally perform his services and the firm states he was never required to meet in person but via on-line calls or video chat. The firm states they did not require the worker's services to be performed from any particular location. The worker was only required to schedule meetings with students and respond to their questions. The firm states they were responsible for the hiring and paying of substitutes or helpers.

The firm provided paper materials / electronic soft copy of training materials to the worker in order for him to perform his services. The firm states the worker did not provide any equipment, supplies, or materials to the work relationship and he did not incur expenses. The clients paid the firm for services rendered by the worker and the firm states they paid the worker on a commission basis. The firm states they and the client established the level of payment for the services provided. The worker did not have an opportunity to incur a loss as a result of his services.

The worker was not eligible for employee benefits. The firm states the worker performed similar service for others but did not advertise his services. The firm represented the worker to their clients as a part-time consultant. Either party could terminate the work relationship at any time without incurring a liability.

The worker's responsibilities in soliciting new clients was to perform an introductory call where the worker introduces himself and outlines how he can help the prospective client. The firm provided leads to the worker and the worker was to gain the sale and to be helpful to provide constructive feedback on the client to help the sales team. The firm states they required the worker to respond to client inquires within three (3) working days. The firm states the worker determined his own territory and they held no requirement on the place where the worker performed services.

Analysis

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.

Evidence of control generally falls into three categories: behavioral control, financial control, and relationship of the parties, which are collectively referred to as the categories of evidence. In weighing the evidence, careful consideration has been given to the factors outlined below.

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 provided the worker with training on how to perform his services. While the worker performed his services away from the firm's premises, the need to direct and control a worker and his services should not be confused with the right to direct and control. The worker provided his services on behalf of the firm rather than an entity of his own. The firm was responsible for the quality of the work performed by the worker and for the satisfaction of their clients. This gave the firm the right to direct and control the worker and his services in order to protect their financial investment, their business reputation, and their relationship with their clients.

The firm's statement that the worker performed services on a part-time basis and therefore, an independent contractor is without merit as both employees (seasonal) and independent contractors can perform services when the needs of a business warrants.

A continuing relationship was established rather than a one-time transaction taking place. A continuing relationship may exist where work is performed in frequently recurring although irregular intervals. The existence of a continuing relationship indicates an employer/employee relationship was established.

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.

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.

If a firm has to make a worker "understand" or "agree to" being an independent contractor (as in a verbal or written agreement or the filing of a Form W-9), then the worker is not an independent contractor. An individual knows they are in business for themselves offering their services to the public and does not need to be made aware of, understand, or agree to be an independent contractor.

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, co-adventurer, agent, or independent contractor must be disregarded.

Therefore, the firm's statement 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.

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.