

SS-8 Determination—Determination for Public Inspection

Occupation

02COO Personal Assistant

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**

CASE FACTS: The payer provides college consulting services, assists students in finding colleges and universities, and aids in completing the application process. The payer is an individual that engaged the worker as a Personal Assistant/Team Member and a Production /Technology Manager/ Student manager from 03/2019 to 07/2020. This was pursuant to a written agreement between the parties. Both parties submitted copies of the contracts. There were two contracts. One was for 2019 and the other was for 2020. They were for different job titles. The worker submitted a Form SS-8 after receiving a Form 1099-Misc from the firm. The firm replied with a Form SS-8.

Both parties agree that the worker received training. The CEO provided the worker with the necessary training materials for her to be able to carry out her responsibilities. The worker received her work assignments via email or a task management website. The worker indicated that the payer determined the methods by which those assignments were performed whereas the payer asserted to the fact the worker could determine those methods but would receive feedback from the CEO. The worker was required to sign a contract that was presented to her from the payer. A contract is an agreement between two parties that creates an obligation to perform (or not perform) a particular duty. According to the contracts, it was emphasized to the worker, she would use her skills, experience, and talents to perform the duties of the position. She was also required to comply with all relevant policies, procedures, rules, and regulations, both written and oral. The worker, as a personal assistant, was required to perform all the necessary job functions as well as a list of responsibilities that were outlined in the contract. Her responsibilities included creating blog posts, providing support with college consulting students and families, providing support with potential clients via Facebook and email, managing the payer's social platforms, supporting the payer with on boarding and off boarding students, and supporting the payer with administrative tasks. In 2020, the workers job title was transitioned from a personal assistant to a Production /Technology Manager and Student manager. The worker edited the payers podcast, YouTube media files and published them for the payer. The worker provided training for new team members. The worker was given a personal email affiliated with the payer's business where she was expected to communicate with the payer's clients. In the contract it was detailed that the worker would work 15-20 hours a week. The worker stated she would typically work Tuesdays 12-5, Wednesdays 12-4, Thursday's 12-2 and was sometimes asked to work more than the contracted hours. The worker worked from home. The payer asserted the worker had not set hours. She was able to choose her time and place of where and when she would complete her responsibilities. The worker received her remuneration semi-monthly. Both parties agree that there were weekly meetings. The worker stated that these meetings were mandatory whereas the payer claimed that they were not. The relationship between the parties was continuous, as opposed to a one-time transaction. The nature of this relationship contemplated that the worker would perform the services personally. The worker worked exclusively and on a continuing basis for the payer. Her services were an integral and necessary part of the services the payer provided to her clients.

The worker specified she was furnished with all software programs that she needed to execute her tasks. The worker only provided her computer. The payer indicated nothing was furnished to the worker. The worker did not lease equipment. The payer determined the fees to be charged. The worker did not incur any significant business expenses. The worker occasionally incurred some parking expenses which were reimbursed to her by the payer. The worker was paid an hourly wage. The payer did not allow the worker a drawing account, or advances against anticipated earnings. The payer's clients paid the payer. The firm did not carry worker's compensation insurance on the worker. The worker did not have a substantial investment in equipment or facilities used in the work and did not assume the usual business risks of an independent enterprise.

The worker was not eligible for sick pay, vacation pay, health insurance, or bonuses. Either party could terminate the relationship at any time without incurring a penalty or liability. There was a "non-compete" agreement between the parties. The worker was not a member of a union. All work produced became the property of the payer. According to internal research the worker did not perform similar services for others. She did not advertise her services to the public. She did not maintain an office, shop, or other place of business. She was required to perform the services under the name of the firm and for the firm's clients. The worker provided evidence of an email address indicating that she was affiliated with the payer. The parties disagree about the way the relationship ended. The payer claimed her, and the worker mutually agreed to end the relationship. The worker stated the payer decided to terminate the position

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.

The payer's contention that the worker was treated as an independent contractor pursuant to an agreement for her to be treated as such is without merit. It is the payer's responsibility to treat workers according to federal employment tax guidelines and law. Neither the payer nor the worker has the right to decide whether the worker should be treated as either an independent contractor or an employee. Worker status is dictated by the characteristics of the work relationship. If the work relationship meets the federal employment tax criteria for an employer/employee relationship, federal tax law mandates that the worker be treated as an employee.

While the payer provided the worker with freedom of action as to when she performed her services, this in and of itself does not determine the worker's status as an independent contractor. The whole relationship needed to be analyzed to determine the worker's correct employment tax status. An important factor of determining a worker's status is who had the contractual relationship with the client and whom did the client pay. In this case, that relationship was between the payer and her clients.

Although the worker may not have been supervised directly while performing her services, this is not sufficient to characterize her relationship as a contract worker. Often because of the nature of the occupation it is not necessary that the worker receive extensive training, instructions or close supervision, the control factor is present if the person or persons for whom the services are performed retain the right to do so.

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 payer 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.

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 payer's customer for poor work, the firm shares the risk of such loss. Control of the payer over the worker would be necessary in order to reduce the risk of financial loss to the firm.

Based on the common-law principles, the payer had the right to direct and control the worker. The worker shall be found to be an employee for Federal tax purposes.

The payer can obtain additional information related to worker classification online at www.irs.gov; Publication 4341