

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 is seeking a determination of worker classification for services performed as a project and marketing coordinator for the firm from January 2017 until November 2019. The worker received a 1099-MISC from the firm for all years in question. The worker feels that they were incorrectly classified as an independent contractor because the firm required the worker to use the firm's equipment, the work relationship was ongoing, and the worker performed services on a steady schedule for the firm with steady pay. The worker provided detailed explanations of their work relationship in a letter, the agreements between the parties, a termination letter, invoices and bank statements, job offer letter, their LinkedIn profile, and a screenshot of the firm's website.

The firm states that it is a design and build firm. The worker was requested to make phone calls, send emails/mailings, be directed by the firm's director of sales, promote the firm and identify leads. The firm states that the worker was not an employee because they did not have employee rights, were not told how to do their job, and the firm only had control over the expected results produced. The firm attached a copy of the agreement between the parties.

The firm states that the worker had adequate training and experience from a previous employer. The firm trained the worker on information about the firm for promotion purposes. The worker received job assignments from the director of sales through telephone, email, and in-person meetings. The worker determined the methods by which job assignments were performed. If the worker encountered any problems or complaints, they were required to contact the director of sales or the firm's president for problem resolution. The worker was required to provide the firm with invoices. The firm states that the worker established their own schedule and set their own hours. The worker performed all services at home. The worker was required to attend periodical meetings at mutually agreed upon times and dates. The firm required the worker to perform services personally. Helpers and substitutes were not applicable. The worker states that they had previous training and were already familiar with the firm's software needed for their job duties. The worker received job assignments through communication with the firm's vice presidents verbally or through email, where they would be requested to make calls to specific geographical areas. The firm requested appointments and prospect names in their travel area. The worker was also requested to call and email trade show attendees to increase the firm's booth visitors. The worker performed their job duties as they had for their previous employer, with the firm's approval. The worker was required to contact the firm's owner or the firm's president for problem resolution. The worker provided the firm with a weekly call report and monthly sales opportunity report. The worker performed services Monday through Friday an average of 5.5 – 6 hours daily. The worker would start by calling banks late morning and cease calls by 5:30pm, and the worker took a lunch break. The worker performed services at home by connecting to the firm's server. The worker was required to attend monthly sales meetings and was required to perform services personally.

The firm states that they provided the worker with a telephone, computer, sales and marketing materials, and postage. The worker provided nothing, did not lease anything, and expenses were unknown. The firm paid the worker an hourly wage as well as commission. The worker would provide the firm with an invoice every month per the agreement between the parties. The worker did not have access to a drawing account for advances. 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 states that they established the level of payment for services provided. The worker states that the firm also provided a headset, server access, business cards, and email templates. The worker provided their home office and office supplies and furniture. The worker's expenses were limited to home office expenses, internet access, and gas and mileage for trips to the firm's office. The firm reimbursed the worker for postage expenses. The worker states they faced the potential economic loss resulting from loss or damage to computer equipment and office furniture. The firm set the level of payment for services provided.

The firm states that the relationship between the parties could be terminated by either party without liability or penalty. The worker did not perform similar services to other firms during the work relationship. A non-compete agreement was in the agreement between the parties. The worker was not a member of a union and did not advertise services to the public. The firm states that they represented the worker as a subcontractor performing services under the firm's name. The firm terminated the contract between the parties due to lack of telemarketing opportunities. The worker was responsible for telemarketing services using targeted lists provided by the director of sales. The worker states that the firm allowed unpaid personal days as a benefit as well as holidays off. The worker's only advertising done was on behalf of the firm during their promotional activities as part of their job duties. The worker was represented as a project and marketing coordinator of the firm performing services under the firm's name. The worker attached a copy of the contract and the termination letter written by the firm ending the work relationship.

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. 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 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.