

SS-8 Determination—Determination for Public Inspection

Occupation 02CSP Computer Services Personnel	Determination: <input type="checkbox"/> Employee <input checked="" type="checkbox"/> Contractor
UILC	Third Party Communication: <input checked="" type="checkbox"/> None <input type="checkbox"/> 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 regard to services performed for the firm from April 2018 to June 2018 as a marketing assistant. The firm issued the worker Form 1099-MISC for 2018. The worker filed Form SS-8 as they believe they received Form 1099-MISC in error. There was no written agreement between the parties. The worker believes they were an employee of the firm because they were given supervision and direction for their job duties and were required to go into the office on occasion.

The firm's response states it is a real estate brokerage firm. The work provided by the worker was as a marketing assistant. The worker was requested to advertise on social media, create marketing design pieces, and edit videos for the firm. The firm did not provide supervision or direction. An email exchange and other supporting documentation was provided by the firm for our consideration.

The firm states that the only training and instruction the worker was given was access to the firm's social media accounts and use of their images and logos. The firm states that the worker received job assignments through emails and lists of upcoming design needs. The firm states that the worker was responsible for determining the methods by which job assignments were performed, and the firm was only responsible for the final edits. If the worker encountered issues with job responsibilities, they were required to contact the firm's owner for problem resolution. The worker did not have to provide reports or attend mandatory meetings. The firm states that other than the occasional in person meeting to review work that was performed by the worker, the worker set their own schedule and determined their own hours. The worker performed most of their job responsibilities at their home location. As the worker was hired specifically for their design skills, the worker was required to perform all services personally. If the worker required helpers or substitutes, the worker was required to hire and pay them. The worker states that the firm provided details specifications for each marketing task that they were required to perform. The worker states that the firm's owner determined the methods by which assignments were performed and was responsible for problem resolution. The worker states that the firm communicated with the worker on seven different channels of communication in order to assign job duties. The worker states that they performed all of their work duties at the firm's office location. Email communication between the worker and the firm as well as attached documentation provided by the firm shows that the worker actually worked a large percentage of their time at home. The worker states that if helpers or substitutes were needed, the firm's owner would hire and pay them.

The firm states that they provided the worker with access to their social media accounts, electricity, and a list of their logos and brand standards. The worker had to provide software, a laptop, a printer, and any other supplies necessary to perform their job duties. The worker did not have to lease space, equipment, or facilities to perform job duties. The worker incurred gas and travel expenses in the performance of job duties when travelling to the office. The firm states that the worker was paid an hourly wage and was not allowed access to a drawing account for advances. The firm provided copies of invoices that the worker provided in order to be paid by the firm. The firm did not carry worker's compensation insurance on the worker. The firm states that it is unknown what sort of economic loss or financial risk the worker took in the performance of job duties. The firm included an email from the worker to the firm where the worker was resigning from their position with the firm because the worker's business was growing substantially with other clients and it was no longer lucrative to continue going into the firm's office to meet with the firm's owner. The firm states that the worker set the level of payment for job duties performed. The firm provided an email conversation between the worker and the firm where the firm offered a set hourly rate to the worker and the worker, after performing research on typical rates in the area for the job field, offered the firm a rate that they felt was fair. The worker states that the firm provided social media accounts, office supplies, and templates for the job assignments performed, and the worker provided their laptop. The worker states that they were paid an hourly wage and did not have access to a drawing account for advances. The worker states that the firm carried worker's compensation insurance on the worker, and also that the customer paid the firm. The worker states that the firm set the level of payment for services rendered.

The firm states that they did not offer the worker any benefits. The work relationship between the worker and firm could be terminated at any time without incurring financial liability. The firm provided an email exchange that demonstrates that the worker was performing similar services for other clients while performing services for the firm. The firm also provided a LinkedIn advertisement of the worker that advertises "Freelance Marketing and Creative Services" from the worker to the public. The worker would submit their final design to the firm's owner for final approval. The firm states that the worker was not represented to customers. The work relationship ended when the worker resigned by email stating that the hours the worker needed to be in the office were no longer financially lucrative for the worker since her freelance marketing business was growing exponentially. The worker provided a final invoice to the firm as part of their resignation from their marketing duties. The worker states that they did provide similar services to other firms during the work relationship with the firm. The worker states that they were not allowed to work for another real estate broker, and that they were represented as an employee of the firm.

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, co-adventurer, 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. The firm did require the worker to personally provide services, but this was due to the fact that the worker was chosen specifically for their design skills as advertised on social media. The firm did not provide supervision or control over the worker's performance or the manner in which the job responsibilities were performed. There was no training or supervision provided by the firm for the worker's job responsibilities, and the worker was able to determine how best to perform job responsibilities due to existing design skills that the worker already was using in their job duties with other clients performing similar services.

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 was paid an hourly wage, but the amount was agreed upon by the firm when offered up as a suggested rate by the worker. The worker provided the firm with invoices in order to get paid for services rendered. The worker also faced the economic loss of equipment, supplies, or medical expenses during the performance of job duties. The worker provided nearly all the supplies and expenses that they needed for their job performance apart from access to social media accounts and design templates provided by the firm. 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.

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 engaged in an independent enterprise, and advertised their own personal services to the public on various websites and social media platforms. Both parties retained the right to terminate the work relationship at any time without incurring a liability. 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 did not have the right to exercise direction and control over the worker to the degree necessary to establish that the worker was an independent contractor operating their own trade or business and not a common law employee.

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