

SS-8 Determination—Determination for Public Inspection

Occupation

02CSP Computer Services Personnel

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 submitted a request for a determination of work status in regard to services he performed for the firm as an IT Technician. The firm is in the business of providing information technology consulting and technical services to its clients. The firm reported the worker's earnings on Forms 1099-MISC. The worker filed Form SS-8 as he believes that he was an employee.

The firm's response describes that the business specializes in design, deployment, and support technology from cable to cloud. The worker was engaged from tax year 2012 to 2018 as an IT support technician. The worker was classified as an independent contractor as he had the ability to accept or decline assignments. There was a written agreement between the two parties.

The firm stated they provided no training or instructions to the worker in order to perform his services. The worker set his own hours and schedule, he performed tasks needed by the client and each day the worker's routine was different depending on issues which arose. The worker was required to personally perform his services and he performed those services 90% of the time at the client's location and 10% of the time at other remote sites. The worker was required to submit reports. The firm states the worker was responsible for the hiring and paying of substitutes or helpers with its approval. The firm stated the worker was required to notify them if any problems or complaints arose for their resolution.

The firm did provide equipment, supplies, or materials to the worker in order to perform his services. The worker provided a standard assortment of material used in the installation of equipment. It is unknown to the firm if the worker incurred expenses while performing his services. The clients paid the firm for services rendered by the worker and the firm paid the worker on an hourly basis. It is unknown to the firm if the worker could incur a loss as a result of his services.

The firm stated the worker was not eligible for employee benefits. It is unknown to the firm if the worker performed similar services for others. The worker did not advertise his services to the public. The firm stated they represented the worker as a contractor for their company. Either party could terminate the work relationship at any time without either party incurring a liability.

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 they have 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. Furthermore, whether there is an employment relationship is a question of fact and not subject to negotiation between the parties.

Therefore, the payer's statement that the worker was an independent contractor 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.

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. In this case, the instructional services performed by the worker were integral to the payer's business operation. The payer provided work assignments by virtue of the clients served, determined the methods by which assignments were performed, and assumed responsibility for problem resolution. These facts evidence the payer retained the right to direct and control the worker to the extent necessary to ensure satisfactory job performance in a manner acceptable to the payer. Based on the worker's education, past work experience, and work ethic the payer may not have needed to frequently exercise its right to direct and control the worker; however, the facts evidence the payer retained the right to do so if needed.

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