

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 worker status in regard to services performed for the firm from July 2019 to September 2019 as a business consultant. The services performed included delivering corporate customers of all sizes data analytics consultancy. The firm issued the worker Form 1099-MISC for 2019. The worker filed Form SS-8 as he believes he erroneously received Form 1099-MISC.

The firm's response, states its business is engaged in information technology and data analysis consulting services for customers. The worker was engaged as a business consultant. The services performed included using software technology to analyze customer's data and provide analysis and reports based on customer's business questions and needs. The worker was classified as an independent contractor as he was on a temporary contract and his experiences in his resume were as a contractor for various projects. Services were performed under an independent contractor agreement.

The firm stated it provided background and ramp information for the client project the worker was hired to work on. The firm and customer provided work assignments. The worker determined the methods by which assignments were performed. The firm or customer could both be contacted depending on the question or problem. The worker was to try and resolve on his own and if unsuccessful then ultimately the firm assumed responsibility for problem resolution. The firm and customer standard work schedule were weekdays, Monday through Friday. Customers were in a variety of time zones. The tasks and times were decided mutually between the firm, the customer, and the worker. The worker had access to work at the customer location and also had the flexibility to work from home. The worker attended various meetings with the firm and customer to review progress of work and give presentations of completed work. The firm required the worker to personally perform services. The worker stated the firm required him to attend full-time software training. The firm assigned him to specific accounts and required him to answer to client requests. The firm determined the methods by which assignments were performed. The firm required him to work a set number of hours per client project each week. The worker was required to report on-site. The firm was responsible for hiring and paying substitutes or helpers.

The firm stated it provided an email. The worker provided cell phone and anything else needed for the job. The customers provided computer and software applications. The worker did not lease equipment, space, or a facility. Customers paid the firm. The firm paid the worker an hourly rate of pay; a drawing account for advances was not allowed. The firm did not carry workers' compensation insurance on the worker. The worker did not incur economic loss or financial risk. The level of payment for the services provided were mutually agreed upon.

The firm stated there were no benefits made available to the worker. The work relationship could be terminated without penalty. The worker did not perform similar services for others. An agreement prohibiting competition between the parties did not apply. The worker had a profile for self-marketing. The firm represented the worker as a contractor to its customers. Services were performed under the firm's business name. The work relationship ended when the worker terminated his services after six weeks. The worker stated the firm provided instruction for product processes. He was to provide the finished product to the firm for approval and then present it to customer. The firm represented the worker as an employee, consultant, and subordinate to its customers.

The independent contractor, signed by both the firm and worker, documents, in part the worker would provide business consulting services and solution design best practices for the firm's customer. The agreement was for a six-month period. The firm was to pay the worker an hourly rate of pay. The worker could not assign any of the worker's rights under the agreement, or delegate the performance of any of the worker's duties without prior written consent of the firm. The firm could terminate the agreement at anytime. The worker could terminate the agreement by providing a twenty day written notice to 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, coadventurer, agent, or independent contractor must be disregarded.

Therefore, the firm's statement that the worker is an independent contractor pursuant to a written 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 and ultimately 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. As acknowledged by the firm the worker did not incur economic loss or financial risk. 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. 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.