

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 firm's business is computer data protection and data recovery services. The firm engaged the worker as software developer from 10/2020 to 2/2021. The firm's perspective is the worker worked remotely from his home and used his own computer and tools of the trade. They feel that for this reason the treatment of the worker as an independent contractor was accurate. This was pursuant to a written agreement between the parties. The worker had previously performed services for the firm. The worker submitted a Form SS-8 after receiving a Form 1099-Misc from the firm. The firm replied with a Form SS-8.

The worker indicated he received training and instructions from the firm. He was instructed on how, when and what values to use when updating databases. He was trained how to perform the services in a particular way to follow the firm's established business rules and was trained on coding standards. According to the firm, the worker received no training. The worker was to write programs to enhance the current firm's program. He would receive his work assignments from the firm via Jira board. Occasionally he would receive his work assignments via slack or by phone. He indicated the firm would determine the methods by which those assignments were performed with regards to higher priority work being accomplished first. The assignments received by the worker also had times with an estimated completion time. Comparatively, the firm specified the worked independently and could work according to his own schedule. He received bi-weekly remuneration for his services. The firm was responsible for problem resolution. The worker was required to submit a timesheet to the firm. The firm stated no reports were required from the worker. The worker remotely from his home for the firm. 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 firm. His services were an integral and necessary part of the services the firm provided to its customers. The parties disagree on the hiring and paying of substitutes or helpers. The worker stated it was the firm's responsibility whereas the firm contends it was the worker's responsibility.

According to the worker, the firm provided him with a computer and all software needed to perform the services for the firm. The worker stated he provided only his computer which he connected to the firm using their VPN connection. The firm determined the fees to be charged. The worker did not incur any business expenses while providing his services to the firm. The worker stated he was paid a salary, and as such, was guaranteed a minimum amount of compensation. He also received a wellness benefit from the firm. The worker provided an offer letter as evidence he received from the firm outlining the terms and conditions of his employment which provided proof of a base compensation. However, the firm contends the worker would bill the firm for his services. The firm did not allow the worker a drawing account, or advances against anticipated earnings. The firm's customers paid the firm. 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 received 9 vacation and 4 personal days. He also received a wellness benefit of \$500 which was paid to him monthly in lieu of health insurance. Either party could terminate the work relationship at any time without incurring a penalty or liability. There was a "non-disclosure" and a "non-compete" agreement between the parties. The worker was not a member of a union. All work produced became the property of the firm. According to internal research, the worker did not perform the services for others. He did not advertise his services to the public or maintain an office, shop, or other place of business. He was required to perform the services under the name of the firm and for the firm's customers. The relationship between the parties ended when the firm terminated the worker.

The information submitted on the Form SS-8 and the internal research conducted provided enough information to provide a determination for this case. The facts of the case indicate that the firm had the right to control the worker.

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.

In determining whether an individual is an employee or an independent contractor under the common law, all evidence of both control and lack of control or independence must be considered. We must examine the relationship of the worker and the business. We consider facts that show a right to direct or control how the worker performs the specific tasks for which he or she is hired, who controls the financial aspects of the worker's activities, and how the parties perceive their relationship. The degree of importance of each factor varies depending on the occupation and the context in which the services are performed.

If a firm has to make a worker "understand" or "agree to" being an independent contractor (as in a verbal or written agreement or the filing of a Form W-9), then the worker is not an independent contractor. An individual knows they are in business for themselves offering their services to the public and does not need to be made aware of, understand, or agree to be an independent contractor.

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. 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.

A worker who is required to comply with another person's instructions about when, where, and how he or she is to work is ordinarily an employee. This control factor is present if the person or persons for whom the services are performed have the right to require compliance with instructions. Some employees may work without receiving instructions because they are highly proficient and conscientious workers or because the duties are so simple or familiar to them. Furthermore, the instructions, that show how to reach the desired results, may have been oral and given only once at the beginning of the relationship.

A continuing relationship between the worker and the person or persons for whom the services are performed indicates that an employer-employee relationship exists. A continuing relationship may exist where work is performed in frequently recurring although irregular intervals.

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 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.

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 firm'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.

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

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