

SS-8 Determination—Determination for Public Inspection

Occupation 02LAW Law Staff	Determination: <input checked="" type="checkbox"/> Employee <input 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 January 2019 to March 2019 as a legal assistant. The services performed included drafting, filing court documents, letter writing, research, and calendaring. The firm issued the worker Form 1099-MISC for 2019. The worker filed Form SS-8 as she believes she erroneously received Form 1099-MISC.

The firm's response, states it's an attorney office offering legal services. The worker was a temporary contract paralegal for 90 days. The worker was given a choice to work as an employee or independent contractor. She chose contractor as she was given leeway to change things. She wanted to be paid on a weekly basis, she had a lot of attitude in the work environment and was free to part-take in other employment opportunities. The work was done under a verbal agreement.

The firm stated it did not provide training or instruction. Work assignments were received base on client needs. The worker determined the methods by which assignments were performed. If problems or complaints arose, the firm was to be contacted for problem resolution. There were no reports required. The worker would arrive to the firm between 8:30 am and 9:30 am and perform services until 4:00 pm or 5:00 pm. Services were performed at the firm's premise. There was a thirty minute meeting held once a week. The firm required the worker to personally perform services. The worker stated the firm provided training on office procedures and was expected to follow the firm's office policies. The firm determined the methods by which assignments were performed. Her daily routine consisted of checking voicemails, emails, and reporting directly to the firm. The firm was responsible for hiring and paying substitutes or helpers.

The firm stated it provided all supplies and equipment. The worker did not lease equipment, space, or a facility. The worker did not incur expenses. Clients paid the firm. The firm paid the worker a salary 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 worker stated the firm did carry workers' compensation insurance on her. The firm established the level of payment for the services provided.

The firm stated the work relationship could be terminated without penalty. There was no agreement prohibiting competition between the parties. The worker did not advertise. The firm represented the worker as a paralegal to its customers. The work relationship ended when the worker quit. The worker stated there were no benefits made available to her. She did not perform similar services for others.

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 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 clients served 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. As acknowledged by the firm she did not incur economic loss or financial risk. Based on the salary rate of pay arrangement she 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