

SS-8 Determination—Determination for Public Inspection

Occupation

02CON Consultants

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 January 2016 to December 2016. The worker's initial job title was vice president of marketing. After 90-days, the worker was promoted to chief marketing officer. The work done by the worker included efforts related to customer acquisitions. The firm issued the worker Form 1099-MISC for the year in question. The worker filed Form SS-8 as he believes he erroneously received Form 1099-MISC. The worker believes he was an employee as he worked full-time, Monday through Friday, as a salaried employee. An employment agreement was signed by the firm and worker.

The firm's response stated it is a mobile application company that allows lottery players to scan their paper lottery tickets to get winning results and it helps users earn rewards. The worker's title was originally growth hacker; however, he asked if he could use vice president and chief marketing officer for his LinkedIn profile. The worker helped the firm create and execute marketing strategies through the firm's employees. The worker performed services from his home state and at the firm's office located in another state. The worker requested, in writing, to be classified as an independent contractor. The parties initial verbal agreement included the worker moving in order to work in the firm's office full-time; however, the worker wanted the flexibility to remain in his home state with his family, thus he created and worked his own schedule at locations he chose.

The firm stated it did not train the worker as he brought his independent expertise. The firm shared its business goals with the worker and he had the freedom to be creative and consult with the firm's team. Work assignments were provided to the worker via on-line chats and during meetings. The worker primarily determined the methods by which assignments were performed. The firm was contacted if problems or complaints arose. The firm was responsible for problem resolution. There were no specific reports other than sharing on-line numbers. The worker had no specific routine as he sometimes worked from home and sometimes worked at the firm's office. The parties coordinated via Skype when the worker worked away from the firm's office. 30-40% of the worker's time was spent in the firm's office. 60-70% of the worker's time was spent in his home or other locations. The worker was expected to attend meetings. There were no penalties if he was unable to attend. There was no policy related to hiring or paying substitutes or helpers. It was preferred the firm would hire, if needed. The scenario would decide which party paid substitutes or helpers. The worker hired influencers/helpers. The worker stated the firm provided him specific direction and determined the methods by which assignments were performed. He updated a daily report, which was shared with team members, to document revenue generated by advertising partners. He participated in daily phone calls with the team; interacted with customers and provided support; worked with outside partners in an effort to attract more customers. He was flown to the firm's office on a weekly basis. As part of his job duties, he secured advertising arrangements with others; however, they were compensated by the firm.

The firm stated it provided a Gmail email account, Google on-line services, and a shared desk and chair. The worker provided his own computer and work supplies. The worker did not lease equipment, space, or a facility. The firm reimbursed the worker for flights to its office. Customers paid the firm. The firm paid the worker a fixed monthly salary; 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 established the level of payment for the services provided. The worker stated he did not provide supplies, equipment, or materials. He did not establish the level of payment for the services provide.

The firm stated benefits were not made available to the worker. The work relationship could be terminated by either party without liability or penalty. There was a one-year non-compete agreement. The worker advertised via his resume and experience in on-line directories. The firm represented the worker as an employee to its customers based on the worker's request. The work relationship ended when the worker quit. The worker stated the benefits of sick pay, paid holidays, personal days, and stock options were made available to him. He did not perform similar services for others. He gave a two-week notice.

The attached employment agreement states, in part, the worker was being employed in the capacity of vice president of marketing. As part of the firm's team, the worker would work closely with the firm's marketing and management team to create and effectively execute marketing and growth strategies. The worker agreed to adhere to the firm's confidentiality policy. The worker was expected to work a minimum of 40 hours per week, exclusive of vacation or any other form of leave. The worker would be paid a fixed monthly salary. The firm would deduct or withhold required federal income and social security taxes, as well as all state or local taxes. The firm would evaluate the worker's 90-day performance to possibly offer a permanent full-time opportunity with the firm. The permanent full-time position would include salary plus vested stock option for equity in the firm. The worker agreed to adhere by all of the firm's policies, procedures, rules, and regulations set forth by 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 was an independent contractor pursuant to a written request 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.

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 services performed by the worker were integral to the firm's business operation. The firm provided work assignments, required the worker to report on transactions, assumed responsibility for problem resolution, and required the worker to adhere to its policies and procedures. 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, 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. Based on the salary rate of pay arrangement and as acknowledged by the firm, the worker did not incur economic loss or financial risk.

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. 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 on-line at www.irs.gov; Publication 4341.