

SS-8 Determination—Determination for Public Inspection

Occupation

02OFF Office Assistant

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**

It is our usual practice in cases of this type to solicit information from both parties involved. Upon the submission of the Form SS-8 from the worker, we requested information from the firm concerning this work relationship. The firm responded to our request for completion of Form SS-8.

From the information provided the firm is a residential property management company and the worker was engaged from November 2015 to January 2017 as a subject matter expert. The firm states they hired the worker for her expertise in property management and to help with difficult owner/tenant questions as well as to develop and record business processes. At the time of hire, the worker had 15 years of property management experience. The firm states the worker was looking for flexible hours to be with her family and continue her current business and they were looking for an autonomous self-starter to develop and refine processes and to assist with difficult owner/tenant/accounting questions. The worker's day-to-day responsibilities included assisting with difficult owner/tenant emails and assisting with shaping the firm's policies and procedures as well as helping with the difficult aspects of property accounting. The firm states the worker also helped to shape the firm's accounting system and how to develop their use of this system. Due to the worker's experience, the firm states they used her expertise to select, propose, and implement a new property management system and for approximately six months, the worker's day to day tasks were directly related to this system implementation. The firm states that the firm's owner oversaw all aspects of the system selection and implementation, but the worker's industry knowledge was very useful during the roll-out and early stages with the new system.

The firm believes the worker was an independent contractor (IC) while performing services for them because she was hired as an IC for her subject matter expertise and 15 years of experience, she was never trained by them, and she helped with the development of their company's best practices and processes to train new employees. The firm states the worker had complete autonomy on when and where she worked until her last day and even performed services in various states away from their premises. The firm states the worker never had standing meetings with their manager/owner to discuss her work and was never measured by their evaluation systems; they state regularly two to three days went by without any communication between themselves and the worker. The firm states the worker was hired even though she owned and operated a property management/real estate brokerage business. The firm states the worker's property management services were available throughout the duration of her time with them and she actively marketed herself to new clients and took new business. The firm states the worker regularly took time during the work day to show properties and qualify prospective tenants for her business. The firm states the worker never accrued vacation or paid time off and was never offered other employee benefits and the worker acknowledged her intent to engage in a contract type relationship with them by signing a W-9 form. The worker purchased all supplies necessary to carryout her role in her home office to include her computer, printer, and office supplies. The firm states the worker was permitted to and used her own computer for work she performed for them.

The firm states the worker was responsible to develop her own work assignments based on the needs of their company. The firm states the worker was responsible for determining how she performed her services as she was hired as a subject matter expert and she used her own work products to accomplish her work. The worker's work products included the development of checklists and revisions to the firm's leases and agreements. The firm states the worker did not have set hours or defined daily responsibilities. Many days the worker's level of effort included interacting with office staff, property owners, and tenants to bring her experience to solve problems and refine the firm's policies and procedures. The worker attended a causal video call once a week with the firm to discuss personal and business items. The firm states the primary purpose of the meeting was to build cohesion and use the worker's expertise to discuss potential solutions to difficult challenges. The hiring and paying of substitutes or helpers was not discussed in this work relationship.

The firm states the worker was paid a flat rate bi-weekly to perform her work regardless of the level of effort from week to week. The firm reported the worker's earnings on Forms 1099-MISC. The firm states they cannot think of any loss that the worker could incur as they were paying her for her time and expertise. The firm states the level of payment for the services rendered by the worker was part of the initial negotiation when the worker was hired. Either party could terminate the work relationship at any time without either party incurring a liability.

Analysis

As in this case and in almost all worker classification cases, some facts point to an employment relationship while other facts indicate independent contractor status. The determination of the worker's status, then, rests on the weight given to the factors, keeping in mind that no one factor rules. The degree of importance of each factor varies depending on the occupation and the circumstances.

Evidence of control generally falls into three categories: behavioral control, financial control, and relationship of the parties, which are collectively referred to as the categories of evidence. In weighing the evidence, careful consideration has been given to the factors outlined below.

Factors that illustrate whether there is a right to control how a worker performs a task include training and instructions. In this case, the worker was experienced in this line of work and the firm relied heavily on the worker's experience to see to it that the tasks she was engaged to perform were being performed satisfactorily. A consultant in the business world is used to provide expert advice in a specific field and has wide knowledge of a subject matter. An outside consultant is engaged for a brief period of time and normally used to help find solutions to specific issues. That did not happen in this case. The worker performed services for the firm for well over two to two and one-half years with no end date discussed at the beginning of the work relationship. Because of the worker's extensive experience, she did not require training or extensive instructions or supervision from the firm. The need to direct and control a worker and her services should not be confused with the right to direct and control. The worker performed her services on behalf of and under the firm's business name rather than an entity of her own. The worker had freedom of action in regard to her services as the firm trusted in the worker's expertise to complete the tasks. As evidenced by the copies of emails which the worker provided, she was in contact with the firm on different issues and they connected each week via a video chat. The firm retained the right to change the worker's methods and to direct the worker to the extent necessary to protect their financial investment, their business reputation, and their relationship with their clients.

Factors that illustrate whether there is a right to direct and control the financial aspects of the worker's activities include significant investment, unreimbursed expenses, the methods of payment, and the opportunity for profit or loss. In this case, the worker did not invest capital or assume business risks, and therefore, did not have the opportunity to realize a profit or incur a loss as a result of the services provided. The fact that the worker had a small investment in a computer, cell phone, and printer is not above and beyond what has become the growing trend in homes across the U.S.

Lack of significant investment by a person in facilities or equipment used in performing services for another indicates dependence on the employer and, accordingly, the existence of an employer-employee relationship. 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. Special scrutiny is required with respect to certain types of facilities, such as home offices.

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, both parties retained the right to terminate the work relationship at any time without incurring a liability.

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.

Therefore, the firm's statement that the worker was an independent contractor pursuant to the completion and signing of a Form W-9 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 or the completion of a W-9 form.

We found evidence that the worker does own and operate her own real estate business that provides property management services. However, the worker was personally engaged to perform services for the firm and not her company. It is possible for someone to be self-employed and to perform services for a business as an employee.