

**SS-8 Determination—Determination for Public Inspection**

Occupation

02OFF Office Workers

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**

Information provided indicated the firm is an online company selling entertainment services and acts as a booking agent. the worker performed services as office manager and booking agent as an employee. The firm issued W-2 documents until tax year 2010. From 2011 through 2017 the firm issued Form 1099-MISC. the worker has indicated services did not change, conditions were the same, the firm worked fewer hours and dealt with customers less as the worker took over day to day business. The firm stated prior to 2011 the worker was an employee, work was done in the firm's office on their equipment, at their direction with set times. After the firm stated the work was done in her home, on her equipment, her hours were at her discretion and the rate of pay was determined by the worker. (Copies of e-mails from the worker stating her rates would be increasing were provided.) No training was needed as she had previously performed the same services as an employee. Work assignment were via e-mails from the firm's customers, directed to the worker. The worker provided copies of contracts issued to customers, and the hours booked. Her routine and hours worked were determined by her. Vacations booked were determined by her. The firm indicated they provided the phone service. The worker provided her computer, printer, paper and other office supplies, the paper and toner were billed to the firm. The worker was paid by the hour, plus commissions. The customer paid the firm. She was represented as an associate/contractor, work was performed under the firm's business name.

The worker contends she ran the day to day business for the firm. She indicated the firm controlled the hours worked, the firm decreased the hours, the firm paid monthly commissions, she used the firm's software, hardware, and the customer contracts were returned to the firm. She had been trained how to construct contracts, schedule artists, invoice and bill customers. She indicated she worked nine to five weekdays or when an e-mail or job demanded immediate attention. The worker agreed she worked from her home office. Staff lunch meetings where firm would pick up paperwork on a weekly basis. The worker indicated she provided her own computer. The firm provided the software, e-mail server, printer, external memory, internet, phone, paper clips, toner, binder, business cards, envelopes etc. She was paid by the hour, and the firm paid a two dollar commission for each hour of entertainment booked as a bonus, monthly. The worker agreed the customer paid the firm. The worker stated the firm offered what it could afford and the worker requested periodic raises, gradually. Either party could terminate the work relationship without incurring a penalty or liability. She stated she was represented as an associate of the firm and services were performed under the firm's business name. The firm told her the hours would be decreasing substantially after December 2017 and to find another job, she quit to find other work.

**ANALYSIS**

The question of whether an individual is an independent contractor or an employee is one that is determined through consideration of the facts of a particular case along with the application of law and regulations for worker classification issues, known as "common law." Common law flows chiefly from court decisions and is a major part of the justice system of the United States. Under the common law, the treatment of a worker as an independent contractor or an employee originates from the legal definitions developed in the law and it depends on the payer's right to direct and control the worker in the performance of his or her duties. Section 3121(d)(2) of the Code provides that the term "employee" means any individual defined as an employee by using the usual common law rules.

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. Therefore, your statement that the worker was an independent contractor pursuant to an 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.

-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.

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## Analysis

-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.

-A requirement that the worker submit regular or written reports to the person or persons for whom the services are performed indicates a degree of control.

We have applied the above law to the information submitted. As is the case 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, you retained the right to change the worker's methods and to direct the worker to the extent necessary to protect your financial investment.

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.

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 your business. Both parties retained the right to terminate the work relationship at any time without incurring a liability.

## CONCLUSION

Based on the information provided and common law, I find the worker to have been an employee for all services provided. The fact the services were performed from the worker's home office, does not indicate she open her own business. Work done off the premises of the person or persons receiving the services, such as at the office of the worker, indicates some freedom from control. However, this fact by itself does not mean that the worker is not an employee. Both parties indicated all work continued to be performed under the firm's business name as an associate of the firm. Flexible work hours, also would not make a person an independent contractor. The worker requested pay increases, with the firm's approval, they maintained the right to refuse. The worker continued to utilize the same contracts for the customers, the firm provided the software, phone, server, external memory etc.