

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 indicates the firm is a real estate agent who is an independent agent working for an area real estate affiliate. He and another agent work in that office. The worker provided administrative services to both agents for tax years 2013, 2014 and 2015. Both agents reported the income paid on Form 1099-MISC, stating the worker set her own hours, used her own equipment and vehicle, worked for others providing similar services. This agent stated the worker approached him to provide services as she was already working with the other agent in the office, as well as other agents. She was not a licensed Realtor at the time, but offered to get her license. The firm indicated she would bill him for the actual amount of time worked. (No copies of those bills were produced.) The firm stated she was not required to do any particular task, at any particular time, unless she wanted to. The firm stated he treated her an Independent Contractor, because that is what the worker wanted to be. She was never given set hours, she gravitated to a fairly set schedule she created. The firm did approach her to work for him exclusively, she declined. No training was given as she was already experienced in the real estate field. He would call her, text her or email her if he had a specific task he needed done. She offered to cover the task of taking incoming calls or talking to incoming visitors, and would turn them over to him as client. She reported to him verbally what she was doing for the time billed. She worked from eight or nine am and leave by five or six most evenings, Monday through Friday. The work was performed at the real estate office locations and at home and at customer locations. The firm stated she paid for her own Real Estate License, annual/dues, transportation costs, mobile devices etc. The firm terminated the work relationship.

The worker indicated work assignments were given in person or via phone calls or e-mail from the firm. She indicated she performed services eight am until as late as ten pm Monday through Sunday. She agreed services were performed on firm premises and from her home. Meetings were required. She was required to perform her services personally. She stated the firm provided the equipment and supplies. She agreed she was paid by the hour and the customer paid the firm. Either party could terminate the work relationship without incurring a penalty or liability. She agreed she performed services for others, permission was required from the firm. She stated due to health issues the work relationship ended. IRM Section:

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.

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.

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 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 fact there may have been a flexible work schedule, does not make the worker an independent contractor. Furthermore, it is not a matter of choice whether one is an independent contractor, but specific employment tax rules. First one must own and operate their own business to provide the services in question. A person can provide similar services to numerous individuals at one time and be an employee of each. The fact she provided services, in the same office, during the same work hours, another agent, does not make her an independent contractor. It makes her the administrative assistant to the office. The first point of contact for the firm's clients. The worker did not own her own business to provide those services. All work was performed as assigned, and directed, or redirected by the firm. The worker was paid by the hour for the services performed, indicating no opportunity for profit or loss. She didn't bill the firm, she merely submitted the hours worked.