

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**

The worker submitted a request for a determination of worker status in regard to services performed for the payer from February 2016 to October 2018 as an assistant. The work performed by the worker included assisting the payer with correspondence, filing, check writing, running errands, and other general administrative tasks. The payer did not issue the worker tax reporting documents for the years in question. The worker filed Form SS-8 as she believes she should have been classified as an employee and only responsible for an employee's share of tax.

The payer's response states he did not provide the worker with a Form W-2 or Form 1099-MISC. The worker was engaged to help with emails, shopping, driving, writing checks, stamping correspondence, and filling up pill containers. The payer believes the worker was an independent contractor as she could bring her own tools to the work site. She could work from her home but most work was done at the payer's home. There was no written agreement between the parties.

The payer stated a job description provided specific training and/or instruction to the worker. A copy of the detailed job description was provided by the worker. The payer provided the worker daily work assignments. The payer ultimately determined the methods by which assignments were performed. The worker was required to keep a record of the work done and the days and hours worked. A copy of the time sheet document was provided by the worker. The worker's routine was based on her availability. 90% of the worker's time was spent at the payer's home; 10% of her time spent driving the payer somewhere. Meetings were not required. The payer required the worker to personally perform services. The payer was responsible for hiring and paying substitutes or helpers.

The payer stated he provided a computer, car, and telephone. The worker also provided the same. The worker did not lease equipment, space, or a facility. The worker did not incur expenses in the performance of services for the payer. The payer paid the worker an hourly rate of pay; a drawing account for advances was infrequently allowed. The payer did not carry workers' compensation insurance on the worker. The worker did not incur economic loss or financial risk. The payer established the level of payment for the services provided. The worker stated under special circumstances the payer reimbursed her for mileage.

The payer stated the benefits of sick pay, paid holidays, and bonuses were made available to the worker. The work relationship could be terminated by either party without incurring liability or penalty. The worker did not perform similar services for others or advertise. There was no agreement prohibiting competition between the parties. The payer represented the worker as a helper to others. The work relationship ended when the worker quit. The worker stated she was fired after asking to be reclassified as an employee or settled out.

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, a statement that a worker is an independent contractor pursuant to a written or 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 payer required the worker to personally perform services. The payer also provided work assignments, required the worker to report on services performed, and ultimately determined the methods by which assignments were performed. These facts evidence the payer retained the right to direct and control the worker to the extent necessary to ensure satisfactory job performance in a manner acceptable to the payer. Based on the worker's education, past work experience, and work ethic the payer may not have needed to frequently exercise its right to direct and control the worker; however, the facts evidence the payer 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 payer 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 payer 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 payer, the worker did not incur economic loss or financial risk. Based on the hourly rate of pay arrangement the worker 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 payer's personal needs. 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 payer 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 payer can obtain additional information related to worker classification online at www.irs.gov; Publication 4341.