

SS-8 Determination—Determination for Public Inspection

Occupation 02OFF Office Workers	Determination: <input checked="" type="checkbox"/> Employee <input type="checkbox"/> Contractor
UILC	Third Party Communication: <input checked="" type="checkbox"/> None <input type="checkbox"/> 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 2018 to August 2018 as an office worker. The services performed included marketing, website work, billing, accounting, administration of event planning, and other office work. The payer issued the worker Form 1099-MISC for 2018. The worker filed Form SS-8 to determine her worker classification.

The payer response states it is a chamber of commerce, i.e. business promotion organization. The worker originally volunteered. The worker was then contracted for a specific project. The worker was classified as an independent contractor based on signed independent contractor agreements and the fact that she completed projects by setting her own hours, working around other work commitments.

The payer stated it did not train the worker. Projects would be supplied and discussed with the worker. The worker would do them on her own schedule. Work assignments were provided to the worker via discussion or email. When determining the methods by which assignments were performed, the parties would discuss it and the worker would then decide how to do it. If problems or complaints arose, the payer's executive director was contacted and assumed responsibility for problem resolution. Reports were not required. The worker set her weekly schedule which varied. Services were performed at the payer's premises, 80% of the worker's time, and in the community doing various projects (20% of the worker's time). Meetings were not required; however, the worker asked if she could attend at times. The payer required the worker to personally perform services. The worker did not hire substitutes or helpers. The worker stated the payer provided her specific instruction related to programs used in the office and rules of the office. The payer's executive director determined the methods by which assignments were performed. She worked 20-hours per week, typically on Monday, Wednesday, and Friday. The payer required she attend staff and event meetings.

The payer stated it provided the location and computer, as needed. The worker did not lease equipment, space, or a facility. The worker incurring expenses was not applicable. Customers paid the payer. The payer paid the worker an hourly rate of pay; a drawing account for advances was not allowed. The payer did not carry workers' compensation insurance on the worker. The parties mutually agreed upon a level of payment for the services provided. The worker stated the payer also provided a copier and mail machine. She did not incur economic loss or financial risk. She did not establish the level of payment for the services provided.

The payer stated benefits were not provided to the worker. The work relationship could be terminated by either party without incurring liability or penalty. It is unknown if the worker performed similar services for others. There was no agreement prohibiting competition between the parties. The worker did not advertise. The payer represented the worker as an independent contractor to its customers. Services were performed under the payer's business name. The work relationship ended when the worker terminated the work relationship. The worker stated the benefit of paid holidays was made available to her. She did not perform similar services for others.

The first independent contractor agreement states, in part, the worker was retained for services related to administration, marketing, and event planning and set up for the payer. The services to be performed would be completed on a specific date as requested by the payer's staff and board. The work would be done at the payer's office and event locations. The worker would act consistently with the payer's policies and objectives, and would not violate law. The worker would be paid a stipend, i.e. fixed dollar amount, for the time worked, not to exceed 40-hours. The worker would provide the payer an invoice for services rendered.

The second independent contractor agreement states, in part, the worker was retained for services related to event planning, which included marketing, organizing and setting up plus any additional duties related to chamber events for the payer. The worker's services would be retained on a month-to-month basis, subject to monthly renewal, for no more than 20-hours per week, as requested by the payer's staff and board. The work would be performed at the payer's office, worker's home, and event locations. The worker would act consistently with the payer's policies and objectives, and would not violate law. The worker would be paid an hourly rate of pay. The worker would provide the payer an invoice for services rendered. Copies of invoices document the worker reported the date worked and hours worked on each day.

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 payer's statement that the worker was an independent contractor pursuant to written agreements 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. Furthermore, the services performed by the worker were integral to the payer's business operation. The payer provided work assignments and assumed responsibility for problem resolution. 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 expenses in the performance of services for the payer. 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 business. 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.