

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 firm from May 2018 to December 2018. The services performed included administrative work such as managing online customer relationship management (CRM) technology, sending emails, and making phone calls. The firm issued the worker Form 1099-MISC for 2018. The worker filed Form SS-8 as she believes she erroneously received Form 1099-MISC.

The firm's response states it is a financial services business. Services were performed under an independent contractor agreement which documents the worker would perform marketing activities online, in-person, and on the phone for existing assignments, as well as locating new clients; office managerial activities; CRM management and company task manager software management. The worker would provide services for no more than 24-hours per week. The worker was classified as an independent contractor as she worked only about 20-hours per week, could work from any location, and used her own resources.

The firm stated it did not provide the worker specific training as she was supposed to know what to do. The worker self-directed the methods by which assignments were performed. If problems or complaints arose, the firm was contacted and assumed responsibility for problem resolution. Reports included trying to locate at least one new prospect per month. The worker's routine was flexible and self-directed. The worker performed services primarily from her home and occasionally from the firm's office. The firm required the worker to attend a weekly call meeting for updates. The firm required the worker to personally perform services. Hiring substitutes or helpers was not applicable. The worker stated the firm provided her specific training and instruction via its weekly meetings, in addition to lunch and learn meetings. A copy of a meeting agenda was provided for our review. The firm provided work assignments and determined the methods by which assignments were performed. Weekly reports were taken from the CRM. The firm also required her to report the bi-weekly hours worked. A copy of the worker's time report was provided for our review. She performed services at the firm's premises on a regular, recurring basis. The firm also required she attend monthly meetings and trainings. The firm required she sign its acknowledgment forms for its anti-money laundering policies and procedures, sexual harassment policy, and social media conduct policy, which was signed by her supervisor, i.e. firm's managing director and founder.

The firm stated it and the worker did not provide supplies equipment, or materials. The worker did not lease equipment, space, or a facility. The worker incurred the unreimbursed expense associated with her phone bill. Customers paid the firm. The firm paid the worker commission and an hourly rate of pay; it did not guarantee her a minimum amount of pay or allow a drawing account for advances. The firm did not carry workers' compensation insurance on the worker. The worker did not incur economic loss or financial risk. The firm established the level of payment for the services provided. The worker stated the firm provided her a laptop computer, which was returned when she was terminated. She did not incur expenses in the performance of services for the firm as it reimbursed her for going to networking events and the train ticket to work.

The firm stated benefits were not made available to the worker. The work relationship could be terminated by the firm or worker without incurring liability or penalty. The worker performed similar services for others; the firm's approval was not required for her to do so. There was no agreement prohibiting competition between the parties. The worker advertising was not applicable. The firm represented the worker as a contractor/business advisor to its customers. The firm terminated the work relationship. The worker stated she did not perform similar services for others. The firm represented her as a business advisor, representative, team member, or administrator to its customers. She was fired.

The firm stated the worker's responsibilities in soliciting new customers included calling and emailing. The worker provided leads to prospective customers. There were no reporting requirements pertaining to leads. Clients needing business valuation services were submitted to and subject to the firm's approval. The worker determined her territory and she did not pay for the privilege of serving customers. The worker stated the firm provided leads to prospective customers and required her to provide daily and weekly updates. The firm determined her territory. Services were sold from the firm's office.

The independent contractor agreement states, in part, the content, style, form, and format of any work product would be completely satisfactory to the firm and would be consistent with the firm's standards. Completeness of the work product would be determined by the firm in its sole discretion, and the worker agreed to make all revisions, additions, deletions, or alterations as requested by the firm. The worker could not assign the agreement or subcontract or delegate the performance of services without the firm's prior written consent. The firm would pay the worker every two weeks. Expenses needed to be pre-approved in order to be reimbursed.

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 firm's statement that the worker was an independent contractor pursuant to a written 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 firm required the worker to personally perform services. Furthermore, the marketing services performed by the worker were integral to the firm's business operation. The firm required the worker to complete work in accordance with its standards and required her to attend meetings in order to provide work updates. The firm assumed responsibility for problem resolution. These facts evidence the firm retained the right to direct and control the worker to the extent necessary to ensure satisfactory job performance in a manner acceptable to the firm. Based on the worker's education, past work experience, and work ethic the firm may not have needed to frequently exercise its right to direct and control the worker; however, the facts evidence the firm 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 firm 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 firm 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 firm, 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 firm'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 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 firm can obtain additional information related to worker classification online at www.irs.gov; Publication 4341.