

SS-8 Determination—Determination for Public Inspection

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| Occupation 02OFF Personal Assistant | 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 January 2017 to September 2019 as a personal assistant. The payer issued the worker Form 1099-MISC for 2017 through 2019. The worker also received a 2017 Form 1099-MISC from another of the payer's businesses. The worker filed Form SS-8 as she believes she received Forms 1099-MISC in error.

The payer's response states its business is real estate. The worker was engaged to perform marketing and greeting services consisting of greeting customers in the lobby and showing tours. The worker was classified as an independent contractor as she chose when to work and for how long. It was agreed she would work at the property for 20 hours. If she did not have time to work 20 hours, she would work more later.

The payer stated he did not provide the worker specific training or instruction. The worker did what she saw was needed. If problems or complaints arose, the worker contacted the payer's management office. The payer and worker jointly resolved the issue. Reports and meetings were not required. The worker had no set schedule. She typically arrived after 9 am and left by 1 pm. Services were performed at the property location. The payer did not require the worker to personally perform services. As the services performed were not an essential role, substitutes were not needed. The worker stated the payer provided her specific instruction on how to give tours. The payer provided work assignments, determined the methods by which assignments were performed, and assumed responsibility for problem resolution. The payer required her to provide verbal reports. Her routine consisted of giving tours, assisting the payer with his schedule, interacting with clients, answering the front door, running errands, keeping up the appearance of the lobby and surrounding area, and walking the building in order to cite any building maintenance needs. Her work hours were 10 am to 3 pm. She attended meetings as required. The payer required she personally perform services. The payer was responsible for hiring and paying substitutes or helpers.

The payer stated he provided the building. The worker provided herself. The worker did not lease equipment, space, or a facility. The payer reimbursed the worker if she purchased items for the building. Customers paid the payer. The payer paid the worker a lump sum, i.e. fixed weekly rate of pay; a drawing account for advances was not allowed. The worker did not incur economic loss or financial risk. The worker established the level of payment for the services provided. The worker stated the payer initially paid her an hourly rate of pay. Starting in 2018, she was paid salary. She did not establish the level of payment for the services provided.

The payer stated the work relationship could be terminated by either party without incurring liability or penalty. The worker did not perform similar services for others. There was no agreement prohibiting competition between the parties. It is unknown if the worker advertised. The work relationship ended when the worker's services were no longer needed. The worker stated the benefits of paid vacations, sick pay, and paid holidays were made available to her. She did not advertise. The payer represented her as his personal assistant to his customers.

The payer stated the worker was responsible for greeting tenants and customers in an effort to solicit new customers. Outside signage provided the worker leads to prospective customers. The worker stated she gave building tours when the payer was not available. Appointments were set up with the payer.

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.

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. In this case, the marketing and greeting services performed by the worker were integral to the payer's business operation of obtaining new customers. The payer provided work assignments by virtue of the customers served and ultimately 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 his 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 fixed weekly 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.