

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 about services performed for the firm from July 2018 to October 2019 as a special projects' manager. The services performed included day-to-day operations, creating branding materials, selling products, photographing inventory, and more. The firm issued the worker Form 1099-MISC for 2018 and 2019. The worker filed Form SS-8 as he believes he received Form 1099-MISC in error.

The firm's response states its business is interior design and antique sales. The worker was engaged to do photography, run errands, and prepare look sheets. The worker was classified as an independent contractor as he determined the hours and days worked, in addition to using his own computer and camera. Some of the services performed were for the benefit of the worker and others. Benefits were not provided to the worker. In 2019, the worker requested a higher hourly rate of pay. Changing his status was discussed; however, as the worker was not willing to work a standard five-day week the work relationship ended.

The firm stated it did not provide the worker specific training or instruction. Work assignments changed daily based on its needs and the worker's availability. The worker determined the methods by which assignments were performed. The worker submitted time for payment every two weeks. Meetings were not required. Services were performed from the firm's office, worker's home office, and running errands. The worker was not necessarily required to personally perform services. The worker stated the firm provided him specific training and instruction. The firm provided a list of tasks to perform and determined the methods by which assignments were performed. If problems or complaints arose, the firm was contacted and assumed responsibility for resolution. Reports included a daily email detailing items finished. Services were performed at the firm's office on a regular, recurring basis as scheduled by the firm. The firm required he attend weekly meetings. The firm required he personally perform services. The firm ultimately hired and paid substitutes or helpers.

The firm stated it did not provide supplies, equipment, or materials. The worker provided his computer, camera, and car. It is unknown if the worker leased equipment, space, or a facility. If the worker incurred expenses, they were not reimbursed by the firm. Customers paid the firm. The firm paid the worker an hourly rate of pay; a drawing account for advances was not allowed. The firm did not carry workers' compensation insurance on the worker. The worker did not establish the level of payment for the services provided or the products sold. The worker stated the firm provided the office, install equipment, printer and ink, tools, photography equipment, and business cards. He did not lease equipment, space, or a facility. The firm established the level of payment for the services provided or the products sold.

The firm stated benefits were not available 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; the firm's approval was not required for him to do so. There was no agreement prohibiting competition between the parties. As the worker had no direct customer contact, the firm did not represent him to its customers. The work relationship ended when the worker was unable to meet the firm's needs. It elected to hire an employee to replace the worker. The worker stated the benefit of personal days and bonuses was made available. He did not perform similar services for others. The firm required he sign a confidentiality agreement.

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.

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 services performed by the worker were integral to the firm's business operation based on the firm providing work assignments to the worker. 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 the worker likely used his computer, camera, and car for personal needs, they are not considered a significant business investment. 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.