

SS-8 Determination—Determination for Public Inspection

Occupation Business/Computer Services/Office/Sales	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 is seeking a determination of worker classification for services performed as a front window clerk for the firm from January 2019 until April 2019. The worker received a 1099-MISC from the firm for 2019. The worker believes they were misclassified by the firm as an independent contractor because they were hired by the firm's owner as an employee, the firm set the hours and the rules, the worker had no say in how their job was performed, the worker had a key, and the worker used the firm's equipment for their job duties. There were no written agreements between the parties.

The firm states that they are a healthcare clinic. The worker was requested to do multiple jobs for the firm such as cleaning, painting, billing, and clerk and receptionist duties. The firm classified the worker as an independent contractor because the worker set their own hours, use their own products, were not supervised, could hire helpers, and asked for jobs to make more money.

The firm states that they did not provide the worker with any training or instruction. The worker set their own hours and determined the methods by which job assignments were performed. The worker assumed responsibility for problem resolution for any problems they encountered on the job. The worker performed services from Monday through Thursday, 10 am until 7 pm, in the firm's office. The worker would clean and perform office work as well as painting and doing other odd jobs. The worker performed services 75% of the time at the firm's office premises and 25% of the time in their home doing medical billing for the firm. There were no meetings required of the worker and the worker was not personally required to perform services personally. The worker could hire and pay their own substitutes. The worker states that the firm and other firm workers provided the worker with all training and instruction for their job duties. The firm owner provided the worker with job assignments and determined how they were performed. If the worker encountered any problems or complaints while working, they were required to contact the firm's owner for problem resolution. The worker provided the firm with reports on the cash register count and credit card machine printouts. The worker would go into the firm's office at the designated start time and open the office. The worker had their own key provided to them by the firm. The worker would check in patients, do vitals, and perform cleaning duties as needed. The worker would also do medical billing as needed. At the end of the workday, the worker would close up the firm's premises and leave. The worker performed all services at the firm's premises. The worker was required to attend all meetings and to perform services personally. The firm's owner was responsible for hiring and paying all helpers needed.

The firm states that they provided office supplies and paint, and the worker provided certain office supplies that they wanted. The worker did not lease any space, facilities, or equipment. The worker incurred no expenses. The firm paid the worker on an hourly basis with no access to a drawing account for advances. Customers paid the firm. The firm did not carry worker's compensation insurance on the worker. The worker had no exposure to economic loss or financial risk. The worker did not establish the level of payment for services provided. The worker states that the firm provided everything needed for their job duties and the worker did not provide anything. The worker did not lease anything or incur any expenses. The worker was paid an hourly wage by the firm. The firm owned everything used by the worker for their job duties. The firm established the level of payment for services provided.

The firm states that the relationship between the parties could be terminated by either party without liability or penalty. The worker performed similar services for other firms and did not need approval from the firm to do so. The worker was not a member of a union and did not advertise their services to the public. The firm did not represent the worker to the public. The work relationship ended when a financial error was discovered, and the work was let go by the firm. The worker states that paid vacations and bonuses were offered by the firm as benefits. The worker states that they did not provide similar services for other firms. There were no non-compete agreements in place between the parties. The worker was represented by the firm as an employee desk clerk providing services under the firm's name. The worker was fired by the firm for personal reasons.

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 firm required the worker to personally perform services. Furthermore, the services performed by the worker were integral to the firm's business operation. The firm provided work assignments by virtue of the customers served, required the worker to report on services performed, and 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, day, 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. 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.