

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 desk assistant for the firm from January 2020 until June 2021. The worker received a 1099-MISC from the firm for 2020. The worker previously worked for the same firm as a W-2 employee for the first part of 2020 when the firm owner was part of a different office. When the firm reorganized, the worker was classified as an independent contractor despite there being no change in job duties. The worker states that the firm misclassified the worker as an independent contractor because the firm determined the worker's hours and job tasks, the worker did not run their own business, the worker was fired by the firm owner and treated as an employee, and there were no independent contractor agreements between the parties. The worker provided copies of text exchanges between the parties.

The firm states that it is a podiatrist office. The worker was requested to provide services to the firm as a consultant and administrative support assistant. The firm classified the worker as an independent contractor because the worker controlled their own hours, had no set schedule, the firm did not supervise the worker, the work was temporary and not required to be on the firm's premises, and the worker supplied their own tools and materials.

The firm states that there was no training given to the worker. The worker received project assignments from the firm. The worker determined the methods by which job assignments were performed and assumed responsibility for problem resolution. There were no reports required of the worker. The worker did not have a daily routine and performed services on a project-by-project basis. The worker performed services generally on the firm's premises. There were no meetings required of the worker, and the worker was not required to personally perform services. The worker was responsible for hiring and paying all helpers and substitutes. The worker states that they did not receive any specific training or instruction from the firm. The entire working process was controlled and dictated by the firm owner, who gave the worker instructions and implementation of the job tasks. The firm owner determined the methods by which job assignments were performed and assumed responsibility for resolving problems encountered by the worker. The worker was not required to provide the firm with any reports. The worker followed a schedule provided by the firm. The worker's job duties included registering patients, answering calls, and making appointments. The worker was also requested to wash and sterilize equipment, and to clean the office and floors. The worker performed all services at the firm's office premises. No meetings were required, and the worker did not personally perform services. The firm owner was responsible for hiring and paying all helpers and substitutes.

The firm states that they did not provide any supplies, materials, or equipment. The worker did not provide anything or lease anything for their job duties. The firm was unaware of any expenses incurred by the worker in the provision of services. The worker was paid on a daily basis and did not have access to a drawing account for advances. Customers paid the firm. The firm carried worker's compensation insurance on the worker. The worker had no exposure to economic loss or financial risk. The worker established the level of payment for services provided. The worker states that the firm provided a leased office space, furniture, medical equipment, electronic equipment, and office supplies. The worker did not provide or lease anything. The worker incurred no expenses. The firm paid the worker on a fixed daily basis. Customers paid the firm. The worker did not establish the level of payment for services and had no exposure to economic loss or financial risk.

The firm states that they did not offer the worker any benefits. 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. There were no non-compete agreements in place between the parties. The worker was not a member of a union and did not advertise their services to the public. The firm represented the worker as a contractor. The work relationship ended when the worker had a disagreement with a customer and the firm addressed the situation. The worker states that they did not provide similar services for other firms. The worker was represented by the firm as the firm's front desk worker. The worker was fired by the firm owner through texts.

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 daily 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.