

SS-8 Determination—Determination for Public Inspection

Occupation Construction/Technical Services/Trades	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 dressmaker for the firm from October 2019 until September 2020. The worker received a 1099-MISC from the firm for 2019 and a 1099-NEC from the firm for 2020. The worker states that they were misclassified by the firm as an independent contractor because they performed job duties at the firm's shop, the worker was hired by the firm off of Indeed, the firm set the worker's hourly wage and told the worker what to do, the firm provided all materials needed, the firm disciplined the worker for missing work, and the firm treated the worker like an employee. There were no written agreements between the parties.

The firm states that it designs and manufactures women's dresses. The worker was requested to provide seamstress services for the firm. The firm classified the worker as an independent contractor because the worker performed similar services for other firms. The worker was paid by the time they spent on each project.

The firm states that they instructed the worker to follow the rules and procedures of the firm to properly complete job tasks. The owner of the firm gave the worker instructions and determined the methods by which job assignments were performed. If the worker encountered any problems or complaints, they were required to contact the firm's owner for problem resolution. The worker was required to provide the firm with time sheets. The worker performed services for the firm on a part-time basis twice a week on the firm's premises. There were no meetings required of the worker and the worker was not required to personally perform services. The firm owner was responsible for hiring and paying all helpers and substitutes. The worker states that the firm trained them to use tools and the precise steps to put dresses together. The worker came into work at 9am every day and was handed a stack of cut material to be assembled into dresses. The owner determined the methods by which job assignments were performed and assumed responsibility for problem resolution. The worker was not required to provide the firm with reports. The worker started work at 9am Monday through Wednesday, meeting with owner to go over job assignments, and assembling dresses at their assigned workstation. The worker would have lunch around 12 noon and would write their hours on a card at the end of the day. The worker received a check every Monday morning from the firm. The worker performed all services at the firm's shop. There were no meetings required, and the firm required the worker to personally perform services. The owner hired and paid all helpers.

The firm states that they provided an industrial machine, materials, threads, and tools. The worker did not provide or lease anything. The worker incurred no expenses. The firm paid the worker an hourly wage with no access to a drawing account. Customers paid the firm. The firm did not carry worker's compensation insurance on the worker. The worker faced no economic loss or financial risk. The firm's owner established the level of payment for services provided. The worker states that the firm provided sewing machines, sergers, material, thread, scissors, elastic, and any other dressmaking supplies needed. The worker did not provide or lease any space, facilities, or equipment. The worker's only expense was gas to and from the firm's premises. The firm did not reimburse any expenses. The firm paid the worker an hourly wage with no access to a drawing account. Customers paid the firm. The firm did not carry worker's compensation insurance on the worker. The firm owner established the level of payment for services provided.

The firm states that there were no benefits applicable. 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. 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 worker returned all finished products to the firm. The worker was represented by the firm as a subcontractor. The work relationship ended when the worker quit and moved to a different state. The worker states that there were no benefits offered. The worker states that they did not perform similar services for other firms and no non-compete agreements existed between the parties. The worker did not advertise their services to the public. The worker did not assemble any products at home. The worker handed all finished products to the owner for shipping out. Since customers were online, the worker was unsure of how they were represented by the firm. The worker quit and moved away, ending the work relationship.

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, co-adventurer, 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 follow the firm's procedures and rules regarding job duties, 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.