

SS-8 Determination—Determination for Public Inspection

Occupation

03MIS Miscellaneous Laborers

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 in regard to services performed for the firm from November 2014 to September 2016. The work done by the worker included drafting casework shop drawings, attending construction site meetings with the general contractor, verifying field measurements, submitting material orders, tracking material deliveries, tracking inventory of tools and hardware on site, performing material take offs for bidding, and creating the firm's office forms and safety documents. Various job titles included project manager, drafter, and safety coordinator. The firm issued the worker Form 1099-MISC for the years in question. The worker filed Form SS-8 as she believes she erroneously received Form 1099-MISC.

The firm's response states it is a construction business. The worker was engaged as an administrative assistant. The work done included processing information, estimating projects, ordering materials, and documentation. The worker was hired and paid as an independent contractor.

The firm stated it instructed the worker to use her previously obtained experience to complete tasks it assigned. Work assignments were provided verbally, by emails, and by text messages. The firm's owners determined the methods by which assignments were performed and assumed responsibility for problem resolution. Reports and meetings were not applicable. The worker had no set schedule. Certain tasks were to be completed on her own schedule. Services were performed at the firm's office, 80% of the worker's time, and at the worker's home, 20% of her time. The firm required the worker to personally perform services. The firm hired and paid substitutes or helpers. The worker stated the firm provided drafting instruction for structural shop drawings. A daily report for labor on site for the general contractor was required. Services were performed on a regular, recurring basis, typically Monday through Saturday and many weeks also on Sunday, from 7-8 am to 6-8 pm. All services were performed at the firm's offices, i.e. business office or construction/building site office. The firm required her to attend its daily meeting to obtain work assignments and to attend construction site meetings with the general contractor.

The firm stated it provided office supplies and printers. The worker provided a computer. The worker did not lease equipment, space, or a facility. The worker incurred the unreimbursed expense associated with transportation to/from the firm's office. Customers paid the firm. The firm paid the worker an agreed-upon (fixed) weekly 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 incur economic loss or financial risk. The worker established the level of payment for the services provided. The worker stated the firm provided the computer, software, personal protection equipment, office space and furniture, and all supplies needed. She did not provide supplies, equipment, or materials. The firm paid her salary. The firm established the level of payment for the services provided.

The firm stated the work relationship could be terminated by either party without incurring liability or penalty. The worker performed similar services for others; the firm's approval was not required for her to do so. There was no agreement prohibiting competition between the parties. It is unknown if the worker advertised. The firm represented the worker as a contractor to its customers. Services were performed under the firm's business name. The work relationship ended when the worker quit. The worker stated the benefit of paid holidays was made available to her. She did not perform similar services for others or advertise. Working for the firm took all her available work time. Drawings were submitted for the firm's approval. Once finished, they were the firm's property. The firm represented her as an employee to its customers.

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, the firm's statement that the worker was an independent contractor pursuant to a 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. It is noted that 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, determined the methods by which assignments were 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, 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 acknowledged by the firm, 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 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.