

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 for the firm as marketing director, pedorthist, and providing maintenance services from January 2020 until October 2020. The worker received a 1099-NEC from the firm for 2020 as well as a W-2. The worker initially worked for the firm as an employee, left, and then was reclassified to a 1099 contractor upon returning to the firm. The worker states that there were no changes in job duties, they never invoiced the firm, and they never performed work outside of the scope of their employment. There were no written agreements between the parties. The worker provided copies of their pay documents and a letter where the firm terminated the relationship between the parties.

The firm states that it is a medical office. The worker was requested to provide plumbing and painting services. The worker previously provided marketing services for the firm as an employee. The firm classified the worker as an independent contractor because the worker provided repair services outside of the scope of the marketing employment, used their own tools on their own schedule, had no benefits or mandatory hours, and was free to provide services to others. The firm provided copies of canceled checks to the worker as well as a monetary determination letter for an unemployment claim filed by the worker.

The firm states that there was no training or instruction provided to the worker. The worker did not receive job assignments. The worker determined the methods by which job assignments were performed. The worker did not have a supervisor and did not have to provide any reports to the firm. The worker performed services when they wished to do so, and all job duties were performed at the firm's medical office. There were no meetings required of the worker, and the worker did not personally have to perform services. The worker was responsible for hiring and paying all helpers needed. The worker states that they were trained on the firm's policies and procedures and was required to follow them. The firm's supervisor would instruct the worker to visit certain practices in the area for marketing purposes, and patients were assigned to the worker based upon patient need. Maintenance work was performed at the firm's request. The firm's supervisor determined the methods by which job assignments were performed and assumed responsibility for problem resolution. The worker was required to report on marketing activity on spreadsheets, as well as provide patient notes in charts. The worker no longer has access to these reports since they were terminated by the firm. The worker performed services Monday from 8am until 6pm, Tuesdays from 1pm to 5pm, and Thursdays from 1pm to 5pm, for a total of 18 hours weekly. Most work was performed on the firm's premises, with the exception of marketing work being performed in the community. The worker was required to attend monthly staff meetings, with the penalty of termination if they did not attend. The worker was required to perform services personally. If the firm required additional helpers, the firm was responsible for hiring and paying all helpers needed.

The firm states that they did not provide any tools, supplies, or equipment as the worker's job duties were outside of the scope of the medical practice. The worker provided their own tools and equipment. The worker did not lease any space, facilities, or equipment. The worker's expenses included paint, tools, supplies, and equipment needed. The firm reimbursed the worker for paint and supplies. The worker was paid through two checks by the firm, and the firm provided copies of these checks, on a per-project basis. The worker did not have access to a drawing account for advances. There were no customers applicable. The firm did not carry worker's compensation insurance on the worker. The worker faced the possibility of damage or loss of their tools, equipment, or supplies. The worker established the level of payment for services provided. The worker states that the firm provided all supplies, materials, and equipment needed for the job duties, and the worker did not provide or lease anything. The worker did not incur any expenses as all job-related expenses were purchased with the firm's corporate credit card under the worker's name. The firm paid the worker an hourly wage with no access to a drawing account for advances. Customers paid the firm for services provided. The firm carried worker's compensation insurance on the worker. The worker had no exposure to economic loss or financial risk. The firm owner established the level of payment for services.

The firm states that there were no benefits offered to the worker. 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 did not do any advertising to the public. The worker did not represent the firm and was not represented by the firm in any manner. The worker was terminated by the firm for cause and the firm no longer had any repair work to be completed, so the work relationship ended for two different reasons. The worker states that they did not perform similar services for other firms. The worker was not a member of a union and did not advertise their services to the public. The worker was represented by the firm as an employee of the firm. The firm fired the worker and ended the work relationship. The letter from the firm to the worker terminating them for services in October 2020 states clearly that they had the job title of marketing director, maintenance personnel and pedorthist at the time of termination. The worker performed marketing work to solicit patient referrals on behalf of the firm. The firm doctor sent the worker to certain offices to perform these marketing duties.

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 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 termination letter provided by the worker that was issued from the firm clearly states that there was no change in job title from when the worker was classified as an employee vs. when the firm reclassified the worker as an independent contractor. 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.