

SS-8 Determination—Determination for Public InspectionOccupation
03PVW Color

Determination:

☒ Employee☐ Contractor

Correction

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 firm is a video on demand website who had investors in the business. One of the investors engaged the worker as an employee to perform color correction and grading on film footage after productions for the firm's business films to ensure consistency throughout each production. The work was performed on a project by project basis. A verbal working relationship agreement was entered into.

The firm assigned the worker project to work and the firm and worker determined the methods used to perform the services. The firm required the worker to resolve any problems or complaints. The worker was required to meet deadlines in performance of the services as indicated by the firm. The worker performed services at the firm's place of business and from home. The worker was required to attend weekly production meetings. The worker performed the services personally.

The firm provided the place of business and equipment. The worker provided personal equipment. The worker did not lease anything or incur any expenses. The firm paid the worker a monthly amount for working on projects. The customers paid the firm. The firm did not carry workers' compensation insurance. The firm indicated the worker determined the level of payment for the services and products sold and the worker stated the firm determined this issue. The firm stated the worker was responsible to pay subcontractor if he hired any and would be responsible for damage to firm's equipment. The worker did not indicate any economic loss or financial risk could be incurred by the worker.

There was no contract between the firm and worker. The firm verbally told the employees that if they wanted to work for the firm as Independent Contractors they could stay as they could not afford to pay them as employees and provide benefits in June of 2017. The worker received paid benefits when the firm paid the worker as an employee. The worker could not terminate the working relationship without incurring a liability prior to completion of the project per the firm and worker indicated that he could terminate the working relationship without incurring any liability. The worker did perform similar services for others with the firm's prior approval per worker and firm indicated the firm did not need to provide the worker with prior approval. Per the firm the worker advertised and per the worker no business advertising was done. The worker terminated the working relationship.

Analysis

The firm engaged the worker through a referral by an investor to perform post production digital colorist and camera operator services for the firm's business as an employee. The firm paid the worker on a project by project basis as an employee for the services. In May of 2017 due to this business cash flow becoming limited the firm offered the employee the option to become a contract worker or leave the business. The worker stayed and was issued a Form 1099-MISC by the firm for the same services performed as an employee.

The withholding of income tax or the Federal Insurance Contributions Act (FICA) tax from an individual's wages is "treatment" of the individual as an employee, whether or not the tax is paid over to the Government. The filing of an employment tax return and Form W-2 for a period with respect to an individual, whether or not tax was withheld from the individual, is "treatment" of the individual as an employee for that period.

The worker received a Form W-2 and a Form 1099-MISC from you in the course of the work relationship, and the services did not substantially change. As previously stated, the issuance of Form W-2 and/or the withholding of taxes on income for an individual would be considered treatment of the individual as an employee, and would apply in this case.

Therefore, your statement that the worker was an independent contractor pursuant to an 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.

Therefore we have determined the worker to be an employee of the firm for the entire working relationship.