

SS-8 Determination—Determination for Public Inspection

Occupation

04DIR Dir.of Comm., marketing, interviewing, instructor

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 firm is in the business of operating a summer camp that provides debate instructions to middle school students. The worker provided marketing services, screened new hires and was a camp instructor. He received a 2017 Form 1099-MISC, for services performed in 2016 and 2017. There was no written agreement.

The worker received written and oral instructions from the firm regarding interviewing and the selection process as well as camp directional activities; however, the firm noted that there was no training. The worker received his work assignments via electronic communications. The firm indicated that assignments were on spreadsheets and that the worker requested certain dates for instruction. Each party indicated that the other determined the methods by which the assignments were performed; only the worker noted that the firm would be contacted if any issues or problems arose. He reported orally and in writing with the firm noting that the worker reported on new hire applicants and student survey results. The worker arrived at camp in the morning and left late in the day; he worked at home, at a chapel or at a church. The firm noted that the worker attended high school in the winter; then in the evenings, the worker conducted interviews, and attended camp fairs. In the summer, the worker taught all day. He worked from home, the library, the coffee shop or at the customer's location. There were weekly conference calls with the firm's owner; the firm noted that the worker attended morning meetings with the staff in the summer. Both parties agreed that the worker was required to personally provide the services; only the firm noted that they would hire and pay any substitutes.

The firm provided all equipment and supplies; the firm noted that another party provided the space. Both parties agreed that the worker was paid a lump sum. The customer paid the firm. The firm established the level of payment for services (the student tuition) though there was some fee negotiations with worker.

Both the firm and the worker agreed that there were no benefits and that either party could terminate the relationship without incurring a liability. The worker did not perform similar services for others. The relationship ended when the job was completed.

Analysis

In determining whether an individual is an employee or an independent contractor under the common law, all evidence of both control and lack of control or independence must be considered. The relationship of the worker and the business must be examined. Facts that show a right to direct or control how the worker performs the specific tasks for which he or she is hired, who controls the financial aspects of the worker's activities, and how the parties perceive their relationship should be considered. As is the case in almost all worker classification cases, some facts point to an employment relationship while other facts indicate independent contractor status. The determination of the worker's status, then, rests on the weight given to the factors, keeping in mind that no one factor rules. The degree of importance of each factor varies depending on the occupation and the circumstances.

Factors that illustrate whether there is a right to control how a worker performs a task include training and instructions. In this case, the firm retained the right to change the worker's methods and to direct the worker to the extent necessary to protect its financial investment. The firm obtained the clients, i.e., the students for the debate camp. The firm remained responsible for the program offered and to its students. The worker was engaged to assist in marketing the program and interviewing potential instructors, even though the worker was inexperienced. In addition, he also performed services as an instructor when the summer camp was operating. The work relationship between the two parties remained casual and not formalized by a written agreement. While the worker was given considerable latitude in his marketing and interviewing endeavors, once he agreed to teach set scheduled classes, it is reasonable to assume that he was expected to adhere to the scheduled dates and times. The establishment of set hours of work by the person or persons for whom the services are performed is a factor indicating control. If the nature of the occupation makes fixed hours impractical, a requirement that workers be on the job at certain times is an element of control. Furthermore, the worker was required to provide his services personally. 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. The worker provided his services to the firm for a brief period of time; however, those services were continuous and not just a one-time event, even though the worker was paid a lump sum amount for his efforts. A continuing relationship between the worker and the person or persons for whom the services are performed indicates that an employer-employee relationship exists. A continuing relationship may exist where work is performed in frequently recurring although irregular intervals.

Factors that illustrate whether there is a right to direct and control the financial aspects of the worker's activities include significant investment, unreimbursed expenses, the methods of payment, and the opportunity for profit or loss. In this case, the worker did not invest capital or assume business risks, and therefore, did not have the opportunity to realize a profit or incur a loss as a result of the services provided. The worker had no investment and therefore, no risk. The worker received a lump sum amount for all his services with the amount negotiated at the end of the work relationship. The risk that a worker will not receive payment for his or her services, however, is common to both independent contractors and employees and, thus, does not constitute a sufficient economic risk to support treatment as an independent contractor.

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. There were no benefits and there was no written agreement. The worker was engaged to provide a variety of services for the firm's start-up operations of establishing a summer camp program. When doing so, the worker was not engaged in a separate business venture. He also did not hold himself out to the public to provide those services for others. Integration of the worker's services into the business operations generally shows that the worker is subject to direction and control. When the success or continuation of a business depends to an appreciable degree upon the performance of certain services, the workers who perform those services must necessarily be subject to a certain amount of control by the owner of the business whether that control was exercised or not.

In *Bartels v. Birmingham*, 332 U.S. 126, 1947-2 C. B.174, the Supreme Court stated that whether there is an employment relationship is a question of fact and not subject to negotiation between the parties. So simply stated, the two parties cannot agree to an independent contractor relationship if the facts of the relationship indicate that it was one of an employer-employee.

Based on the above analysis, we conclude that the firm had the right to exercise direction and control over the worker for the entire work relationship to the degree necessary to establish that the worker was a common law employee and not an independent contractor operating a trade or business.

Please see Publication 4341 for guidance and instructions for firm compliance.