

SS-8 Determination—Determination for Public Inspection

Occupation

04DIR Senior Program Director

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 August 2017 to December 2020 as a senior program manager. The firm issued the worker Form 1099-MISC for 2018 through 2020 and a W-2 for 2017. The worker filed Form SS-8 as they believe they received Form 1099-MISC in error. The worker provided copies of pay documents showing that they were classified previously as a W-2 employee prior to 2018.

The firm's response states it is a project that assists under-represented experts in taking leadership positions. The work provided by the worker was that of a senior program manager. The worker was requested to provide technical support and fellowship support on public workshops. The firm states that the worker was free to work for other companies and set their own schedule, was paid on a per-project basis, and used their own resources for their job assignments. The firm attached an agreement between the parties.

The firm states that the worker did not receive any training or instruction regarding their job duties. The worker would receive job assignments on a project basis via email. Each project agreement would be signed. The worker would have discretion and flexibility to determine how to address each assignment. The worker was required to contact the point of contact (POC) at the firm for any problem resolution. The worker was required to provide the firm with launch reports, post-convening reports, and impact reports. The worker could set their own schedule but had to be available during workshops and virtual events. The work was performed virtually and the worker could work wherever they chose. The worker was required to join meetings that were specified in their contract. The firm required the worker to perform services personally. If helpers or substitutes were needed, the firm was responsible for hiring and paying the additional help. The worker states that the firm owner trained and instructed the worker since they were hired in 2013. The worker states that the firm owner and director of fellowships would assign tasks. A handbook given to the worker by the firm and the firm itself determined the methods by which job assignments were performed. If problems were encountered, the worker would reach out to the firm's owner or director of fellowships for joint problem resolution. In addition to the aforementioned reports that were required of the worker, the worker also provided the firm with internal "debriefs" following seminars/convening. The worker attended meetings throughout the week, performing services Monday through Friday from 10am until 6pm. All services are now performed virtually since the pandemic began, but prior to the pandemic there were in-person convening and seminars that were attended by the worker. The worker performed services virtually and by phone from their home office. The worker was required to perform services personally and could not hire substitutes or helpers.

The firm provided the worker with an email address, intellectual property, and content that related to their contract. The worker was required to provide their own laptop and internet service. The worker did not have to lease space, facilities, or equipment. The firm was unaware of any worker expenses. The firm would reimburse travel expenses. The worker was paid on a piece-work basis and was not allowed access to a drawing account for advances. The firm's attached agreement specifically required the worker to invoice the firm in order to be paid, and attached a copy of one of the invoices. Customers would pay the firm, and the firm did not carry worker's compensation insurance on the worker. The worker faced no economic loss beyond the loss of compensation. The firm states that the worker set the level of payment for services rendered. The worker states that all expenses that were incurred by the worker in the performance of their job were reimbursed by the firm or paid in advance by the firm. The worker was paid a salary by the firm until August 2017, then by lump sum afterwards. The worker was not allowed access to a drawing account for advances. Customers would pay the firm, and the firm set the level of payment for services rendered. The worker states that they did not have exposure to economic loss or financial risk.

The firm states that they offered the worker bonuses based upon performance. The relationship between the parties could be terminated by either party without liability or penalty. The firm states that the worker performed similar services for other firms during the work relationship and did not need approval from the firm to do so. There were no non-compete agreements between the parties beyond soliciting clients, which is mentioned in their contract. The worker was not a member of a union. The firm provided all templates needed for assignments by the worker. The worker did not advertise their services to the public. The firm states that they did not mention how they represented the worker, but the worker is represented on the firm's website as a senior program manager. The worker still performs services for the firm. The worker states that they did not perform similar services for other firms during the term of their work relationship. The worker states that they did not advertise their services to the public. The worker states that they are represented as a senior member of the core team staff of the firm and was represented by the firm as an employee.

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, 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 through a variety of reports, 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. The worker incurred no expenses based upon the fact that the firm reimbursed work-related expenses. The worker did not have any exposure to economic loss or financial risk. Based on the per-project 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.