
SS-8 Determination—Determination for Public Inspection

Occupation

DIR - Directors

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 determination in connection with services performed for the firm in 2024 as the director of research and development. Services performed for the firm included project management, assistance in sales cycles, identifying grants, and other duties as assigned by the firm. The worker filed Form SS-8 as they believe they received Form 1099-NEC in error. The worker believes they were an employee of the firm as they received directives from the firm. The firm provided the worker with health insurance, paid time off, and sick days.

The firm's response states its business is a family owned agricultural and hemp business engaged in farming, product development, manufacturing support, and consulting. The worker was engaged as the director of research and development. Services performed included production oversight, product development, vendor sourcing, general consulting, and client support. The worker was classified as an independent contractor as the worker controlled their own schedule, did not clock in or out, completed a Form W-9, and maintained a separate business. The firm provided the worker's signed Form W-9, Request for Taxpayer Identification Number and Certification, which documented their Social Security Number.

The firm states there was no formal training provided to the worker beyond basic orientation to the firm's goals, facilities, etc. The worker was engaged to perform services for the firm based on their expertise. The worker received work assignments in person, by phone, or via email. The worker determined the methods by which those assignments were performed as they were experienced in this line of work. If problems or complaints arose, the worker would be contacted and the worker would escalate issues to the firm. The firm was responsible for resolution. The firm did not require the worker to complete any reports. The firm required the worker to attend staff meetings. Services were performed at various locations including the firm's premises, firm's customers premises, and the worker's office/shop. The worker performed services on an as-needed basis. The firm expected the worker to perform services on a full-time basis but did not receive full-time services. The firm required the worker to personally perform services. The worker could hire substitutes or helpers; approval from the firm was required. The firm was responsible for paying substitutes or helpers. The worker states the firm provided training on shipping procedures, purchase order generation, administrative procedures, software and product knowledge training. The firm provided work assignments and determined the methods by which those assignments were performed. The firm was responsible for problem resolution. Services were performed at various locations on a regularly scheduled basis.

The firm states they provided the worker with a computer, keys, and general paperwork. The worker did not lease space, equipment, or a facility. The worker did not incur any job-related expenses in the performance of the services for the firm. The firm reimbursed the worker for expenses which consisted typically of travel expenses as long as the worker submitted a receipt for reimbursement. Customers paid the firm. The worker was paid a salary which was paid bi-weekly. The worker could not request advance pay. The worker did take a financial risk and could suffer a financial loss performing services for the firm. The firm did not state who set the rate of pay for the services provided. The firm did not carry worker's compensation insurance on the worker. The worker states the firm provided a laptop, formulation equipment, formulation ingredients, office, printer, and software subscriptions. The worker provided a cellphone. The worker incurred vehicle expenses when driving to customer sites. These expenses were reimbursed by the firm. The worker received a salary and commission rate of pay. The worker did not take a financial risk and could not suffer a financial loss performing services for the firm. The firm set the rate of pay for the services provided and products sold.

The firm states the worker was provided with insurance benefits and was eligible to receive commissions or bonuses. Either party could end the work relationship without penalty. The worker did perform similar services for others during the term of the work relationship. There were no agreements prohibiting competition. Services were performed under the firm's business name. The worker ended the work relationship. The worker states they received paid vacations, sick pay, paid holidays, personal days, insurance benefits, and bonuses. The worker did not perform similar services for others. The firm ended the work relationship.

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 an oral 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 customers served and ultimately 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.

The need to direct and control a worker and their services should not be confused with the right to direct and control. The worker provided their services on behalf of and under the firm's business name rather than an entity of their own. The firm was responsible for the quality of the work performed by the worker and for the satisfaction of their customers. This gave the firm the right to direct and control the worker and their services in order to protect their financial investment, their business reputation, and their relationship with their customers.

In this case the firm reimbursed the worker for travel expenses. If the person or persons for whom the services are performed ordinarily pay the worker's business and/or traveling expenses, the worker is ordinarily an employee. An employer, to be able to control expenses, generally retains the right to regulate and direct the worker's business activities. The worker incurred no out-of-pocket expenses.

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. Based on the salary 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 penalty. There is no evidence to suggest the worker performed similar services for others 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.