

SS-8 Determination—Determination for Public Inspection

Occupation 04MAN Managers/Supervisors	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 submitted a request for a determination of worker status in regard to services performed for the firm from February 2017 to May 2017 as an operations manager. The work done by the worker included handling all project budgets, order purchases and returns, invoicing vendors, creating proposals, and corresponding through general email. The firm issued the worker Form 1099-MISC for the year in question. The worker filed Form SS-8 as he believes he erroneously received Form 1099-MISC.

The firm's response states it is an interior design business. The worker was engaged to create a new system for the firm to track its project budgets and he created a new template for the firm's proposals and invoices prepared. The parties verbally agreed to a 90-day contract where the worker would perform specific tasks. When the 90-day contract was up, the firm decided it would no longer work with the worker. An email was sent to the worker to reiterate the verbal terms. The email states, in part, the worker was engaged to perform various administrative services for the firm. Compensation would be a fixed weekly rate of pay. In three months the firm would review the worker's performance and contractor status.

The firm stated it showed the worker past budgets and proposals so he would understand how they were done in the past to inspire new ones. The firm discussed with the worker its goals of having budget and proposal templates to assist it when taking on new projects. The worker determined the methods by which assignments were performed. The firm's acting managers were contacted if problems or complaints arose. The acting managers were responsible for problem resolution. The worker didn't really have reports. He had versions of new budget or proposal formats. The worker's routine consisted of generally five days a week; hours varied but usually 10 to 6 or 9 to 5. The worker usually left the firm's office for lunch. Services were performed at the firm's office. Meetings were not required. The firm required the worker to personally perform services. The worker stated the firm trained and instructed him on how to use its office software. Operations manager training occurred on the weekend. Work assignments were provided verbally, through email and text message, and written notes left on the worker's desk, in addition to assignments given at weekly team meetings. The firm determined the methods by which assignments were performed. The firm required the worker to prepare project budget reports. The firm required the worker to attend weekly staff meetings as scheduled. The firm was responsible for hiring and paying substitutes or helpers.

The firm stated it provided a computer. The worker did not lease equipment, space, or a facility. The worker incurred the unreimbursed expense associated with his cell phone and gas. Customers paid the firm. The firm paid the worker a fixed weekly rate of pay. The firm did not carry workers compensation insurance on the worker. The firm established the level of payment for the services provided. The worker stated the firm also provided a printer, office space, work station, and kitchen supplies. A drawing account for advances was not allowed. He did not incur economic loss or financial risk.

The firm stated the work relationship could be terminated without penalty. The worker did not perform similar services for others. The firm represented the worker as a contractor to its customers. The work relationship ended when the contract ended. The worker stated the firm provided the benefit of sick pay and paid holidays. There was no agreement prohibiting competition between the parties. The firm represented him as an employee to its customers. Work was performed under the firm's business name. The work relationship ended when he was fired.

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. The firm monitored the worker's performance in order to complete its 90-day review. The firm provided work assignments by virtue of its administrative service needs and it 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, 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. As the worker presumably used his cell phone for personal needs, it is not considered a significant investment. Based on the fixed weekly 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.