

SS-8 Determination—Determination for Public Inspection

Occupation

04MAN Managers/Supervisors

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 July 2016 to November 2017 as an office manager/chief financial operating officer (CFOO). The work done by the worker included management of employees and day-to-day operations, scheduling appointments for general dental clients, customer service, bookkeeping, payroll, ordering supplies, employee HR functions, etc. The firm issued the worker Form 1099-MISC for 2017. As payment for the 2016 tax year had not been received, the worker filed a wage claim with the state labor commissioner for non-payment in both 2016 and 2017. The worker filed Form SS-8 as she believes she erroneously received Form 1099-MISC.

The firm's response states its business is dentistry. From August 2016 to December 2016, the worker started advising management and financial aspects of the business. From January 2017 to November 2017, the worker was engaged as a management consultant. The worker was an independent contractor as she held herself out as having expertise in small business management and she performed such services to other businesses.

The firm stated it provided the worker some basic background information regarding dental terminology. The dentist provided assignments to the worker. The worker determined the methods by which assignments were performed. The dentist was contacted if problems or complaints arose. The dentist was responsible for resolution. Reports were not required. The worker did not have set hours due to her other responsibilities. She averaged about 20 hours a week. Services were performed at the dental office, 75% of the worker's time, and at the worker's private office, 25% of her time. The firm required the worker to attend staff meetings and management meetings. The firm required the worker to personally perform services. The dentist was responsible for hiring substitutes or helpers. The firm paid them. The worker stated the firm provided her on-the-job training and daily meetings provided instruction related to client dental needs, operational needs, employee/customer relations, etc. The firm determined the methods by which assignments were performed. The worker's daily routine consisted of opening the office at 7 am, facilitating a morning meeting, checking messages, scheduling appointments, managing employees, ordering supplies, overseeing the general cleanliness of the office, providing lunch relief, closing the office, accounts payable/receivable, bookkeeping, returning customer calls, resolving complaints, etc. Services were performed at the firm's premises.

The firm stated it provided a computer, office supplies, and bookkeeping software. The worker did not lease equipment, space, or a facility. The worker did not incur expenses in the performance of services for the firm. Customers paid the firm. The firm paid the worker an hourly rate of pay; a drawing account for advances was not allowed. The firm did carry workers' compensation insurance on the worker. The worker did not establish the level of payment for the services provided. The worker stated the firm also provided an office, work environment, all equipment, and all supplies, including business cards. She did not incur economic loss or financial risk. The firm established the level of payment for the services provided.

The firm stated benefits were not made available to the worker. The work relationship could be terminated by either party without liability or penalty. The worker performed similar services for others; the firm's approval was not required for her to have done so. The firm represented the worker as a management consultant to its customers. The worker voluntarily terminated the relationship. The worker stated she did not perform similar services for others or advertise. There was no agreement prohibiting competition between the parties. The firm represented her as its office manager/CFOO to its customers. Services were performed under the firm's business name.

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 specific information and work assignments, required the worker to attend various meetings, 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, 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, as acknowledged by the firm, 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 hourly 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.