

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 payer from July 2018 to December 2018 as an office manager and information technology (IT) administrator. The services performed by the worker included posting jobs; interviewing, training, and mentoring; handling phone calls, text messages, and multiple email accounts including that of the payer's executive director; preparing financial and other reports as needed; managing staff and leading the IT and web team; helping prepare for and working at events; public speaking; preparing and sending time sheets; etc. The payer issued the worker Form 1099-MISC for 2018. The worker filed Form SS-8 as he believes he erroneously received Form 1099-MISC as he was hired as a part-time employee. The worker also disputes the amount reported on the Form 1099-MISC.

The payer's response states it is a non-profit organization which implements peer programs. The worker was initially placed with the payer through a workforce development program, which also paid the worker as an employee. When the program arrangement ended, the worker volunteered with the payer. As the worker was already familiar with the payer's organization, he was asked to provide assistance while its executive director was out due to medical reasons. The worker was given the job title of office manager; however, viewed as a consultant. The payer cannot afford employees and the worker was informed he was a sub-contractor. Services were performed under a volunteer application.

The payer stated the worker did not have specific duties. He helped as needed and continued to volunteer at the payer's events. The payer tried to determine the methods by which assignments were performed; however, it was limited due to medical reasons. The payer's executive director or executive assistant (volunteer) were contacted and assumed responsibility for problem resolution. The worker had no routine or designated work time. He looked at the payer's website and informed the web master of needed corrections. Meetings were not required. The worker sometimes performed services from his home. The payer engages workers who are sent and paid by the workforce development program. The worker stated the payer provided him minimal training and instruction. It provided feedback when a mistake was made or praise when a job was well done. The payer provided most assignments. He was allowed to research and define other objectives to help the payer. The payer determined the methods by which assignments were performed. The payer required he prepare various reports. His routine consisted of 9 am to 1 pm, Monday through Friday. Services were primarily performed at the payer's office and occasionally at events or the executive director's house. The payer required he personally perform services.

The payer stated it provided computers and gave the worker an iPad. The worker did not lease equipment, space, or a facility. The worker did not incur expenses in the performance of services for the payer. The payer paid the worker an hourly rate of pay weekly. The payer did not carry workers' compensation insurance on the worker. The worker incurring economic loss or financial risk was not applicable. The worker did not establish the level of payment for the services provided. The worker stated the payer provided most supplies, equipment, and materials. Documentation evidences the payer provided the worker a company email account.

The payer stated benefits were not made available to the worker. The work relationship could be terminated by either party without incurring liability or penalty. The worker did not perform similar services for others. The worker helped to get the payer listed with others as a non-profit. The payer did not represent the worker to others. The work relationship ended when the worker quit. The worker stated the payer occasionally allowed him use of its car as a benefit. He signed a non-compete in April 2018; however, a copy was not provided to him. He did not advertise. A misunderstanding resulted in the work relationship ending.

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 payer's statement that the worker was an independent contractor pursuant to a 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.

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. In this case, the services performed by the worker were integral to the payer's business operation. The payer determined the methods by which assignments were performed and assumed responsibility for problem resolution. These facts evidence the payer retained the right to direct and control the worker to the extent necessary to ensure satisfactory job performance in a manner acceptable to the payer. Based on the worker's education, past work experience, and work ethic the payer may not have needed to frequently exercise its right to direct and control the worker; however, the facts evidence the payer 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 payer 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 payer 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 acknowledged by the payer, the worker did not incur economic loss or financial risk. 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 payer'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 payer 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 payer can obtain additional information related to worker classification online at www.irs.gov; Publication 4341.