

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 January 2018 to April 2018 as an assistant education director (AED). The services performed by the worker included scheduling, assigning teachers, planning lessons, assigning homework to students, managing leads/contacts in a customer relationship management (CRM) system, creating curriculum, and adding to documentation/process guides. The firm issued the worker Form 1099-MISC for 2018. The worker filed Form SS-8 as she believes she erroneously received Form 1099-MISC. The worker believes she was an employee as she was given specific hours to work and specific duties to finish in those hours, as well as estimates as to how long it should take to complete those tasks. The firm also required her to come to the office in order to perform those duties. Services were performed under an AED offer sent via email. A copy was attached for our review.

The worker stated she also performed services from September 2017 to October 2017 as a remote contractor, teaching online from her home. She was not responsible for the same duties as associated with the position of AED.

The firm's response states its business is offering online English lessons. The worker was engaged to evaluate students, prepare lessons, and teach lessons. The worker was classified as an independent contractor as she worked independently without control, was free to work from wherever, free to turn down work when desired, did similar services for others during the term of the work relationship, and submitted Form W-9. Services were performed under a written agreement. The services performed by the worker from January 2018 to April 2018, were substantially the same services performed in 2017, i.e. teaching online classes. The firm hoped the worker would take on more responsibilities as its AED; however, she lacked the necessary skills and failed to meet minimum expectations to perform in the position.

The firm stated it did not provide the worker specific training or instruction. The worker was offered a list of available projects. She was free to accept or decline. The worker determined the methods by which assignments were performed and assumed responsibility for problem resolution. Lesson notes were required from the worker. The worker had no daily routine and she determined the schedule and other details. The worker determined where services were performed. There were no required meetings. The firm required the worker to personally perform services. The worker stated the firm's education director (ED) showed her how to do each task and met with her weekly in order to set goals and help her with time management. Assignments were primarily received orally, although she was assigned students to teach via the scheduling system. The founding director and ED determined the methods by which assignments were performed and assumed responsibility for problem resolution. The firm required she prepare various reports. The firm typically sent her an email the night before her scheduled day telling her what time she was required to come to the office. Later, she started receiving detailed breakdowns of exactly how many minutes she was supposed to spend on each task. A copy was provided for our review. 95% of her time was spent at the firm's premises; 5% at her home. The firm required she attend weekly and bi-weekly meetings scheduled. The firm was responsible for hiring and paying substitutes or helpers.

The firm stated the worker provided and incurred the unreimbursed expense associated with a computer and Internet connection. Customers paid the firm. The firm paid the worker per the contract agreement; a drawing account for advances was not allowed. The firm did not carry workers' compensation insurance on the worker. The worker was required to have her own backup equipment in case of malfunction as it was her responsibility to fulfill the contractual obligations. The worker established the level of payment for the services provided. The worker stated the firm provided an in-office computer, company email account, headset, curriculum, and software. She did not lease equipment, space, or a facility. She did not incur expenses as the firm reimbursed her for transportation. The firm paid her a fixed monthly rate of pay. She did not incur economic loss or financial risk. The firm established the level of payment for the services provided.

The firm stated that if the worker did not perform services, no payment was due to her. The worker did perform similar services for others; the firm's approval was not required for her to do so. There was no agreement prohibiting competition between the parties. The firm represented the worker as a contractor to its customers. The worker terminated the work relationship. The worker stated the firm provided the benefit of sick pay. The work relationship could be terminated by either party without incurring liability or penalty. The firm represented her as its AED to its customers. Services were performed under the firm's business name. The worker gave notice as she didn't think she was being treated fairly.

The firm provided a copy of the remote independent contractor agreement signed by the worker in September 2017. It states, in part, the worker had reviewed the firm's rules and standards and agreed to abide by them. The worker also understood the rules could be updated from time-to-time. All 1:1s were recorded and those recordings could be monitored for quality. The firm agreed to pay the worker an additional fixed fee per month for hig

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 a written 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 AED services performed by the worker were integral to the firm's business operation. The firm's work offer associated with the AED position documents a 32-hour per week contract position, including a six-week training period, fixed work schedule, identified work responsibilities, and the expectation it would become a full-time salaried position, with benefits, starting in June 2018. The position would remain full-time through 2018, even after the firm's education director returned from maternity leave. 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. 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 her home computer and Internet service for personal needs, they are not considered a significant investment. Based on the fixed monthly rate of pay arrangement associated with the AED position, 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. It appears 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 in connection with services performed as its AED, 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.