

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 April 2016 to November 2018 as a supervisor and lab technician. The firm issued the worker Form 1099-MISC for 2016 through 2018; Form W-2 for 2018. The worker filed Form SS-8 as he believes he was misclassified as an independent contractor from April 2016 to July 2018. When reclassified as an employee, details of the work relationship did not change.

The firm's response states its business is making props and costumes for the film industry and displays for trade shows. The services performed by the worker included sculpting, painting, and mold maker. The worker was classified as an independent contractor as is industry standard. For most of the worker's engagement he was also doing other freelance jobs. The firm restructured its business when it began receiving jobs and was able to switch the worker to W-2 status with consistent jobs. The worker invoiced the firm and signed a memorandum of understanding in November 2016. The memorandum states, in part, the firm would engage the worker as a self-employed person, it would not withhold taxes, and it would issue Form 1099-MISC. The worker would be responsible for paying taxes and would not be eligible for unemployment benefits.

The firm stated it did not provide the worker specific training. The firm did provide the worker instruction about how the client wanted the artwork to look. Projects were self-regulated amongst freelance workers. Many times, there were discussions on how to achieve a particular task; however, it was left up to the freelancers to determine how to accomplish the assigned tasks. If problems or complaints arose, people would defer to each other, and the firm would be included. Reports were not required. There was no set schedule. Most people would arrive by 9 am; breaks and working hours were mostly self-regulated. Services were primarily performed at the firm's premises. On occasion there would be install locations for the artwork. There were no required meetings; however, there were occasional meetings to discuss projects. The firm required the worker to personally perform services. The firm hired and paid substitutes or helpers. The worker stated the firm provided him specific training on how to make molds for a specific purpose using unfamiliar materials; additional training was provided for casting plastic parts for costumes. The firm provided work assignments and ultimately determined the methods by which assignments were performed. The firm assumed responsibility for problem resolution. Services were performed on a regular, recurring basis. He was required to attend administrative and staff meetings as scheduled by the firm.

The firm stated it provided an air compressor, band saw, tables, chairs, and other large shop tools. The worker provided a standard toolbox consisting of sculpting tools, mold making tools, drill, etc. The firm's owner had tools which other people could use if needed. The worker leased regular industrial workspace. All expenses incurred by the worker for the job were reimbursed by 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 carried workers' compensation insurance on the worker. The worker did not incur economic loss or financial risk. The firm established the level of payment for the services provided. The worker stated he did not lease equipment, space, or a facility.

The firm stated benefits were not applicable. The work relationship could be terminated by either party without incurring liability or penalty. The worker performed similar services for others during the period in question. The firm's approval was not required for the worker to do so. There was no agreement prohibiting competition between the parties. The worker did not advertise. Finished products were returned to the firm or delivered to the client. The firm represented the worker as a subcontractor to its customers. Services were performed under the firm's business name. The work relationship ended when the worker was let go. The worker stated the firm's approval was required in order to perform similar services for others. The firm represented him as an employee to its customers.

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 services performed by the worker were integral to the firm's business operation. The firm provided work assignments by virtue of the clients 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.

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 acknowledged by the firm, 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 firm's business. Both parties retained the right to terminate the work relationship at any time without incurring a liability. As acknowledged by the firm, the worker did not advertise. 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 for the entire work relationship, 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.