

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 2019 to May 2019 as a general manager. The services performed included marketing, promoting, as well as managing staff and daily operations. The firm issued the worker Form 1099-MISC for 2019. The worker filed Form SS-8 as she believes she erroneously received Form 1099-MISC.

The firm's response, states the firm is a sailing club and academy. The worker was engaged as a temporary general manager. The worker was classified as an independent contractor as she was hired on a temporary basis until she could prove herself and her ability. The worker agreed to defer her pay until the time she could increase revenue and cash flow.

The firm stated services were performed wherever the worker could send emails; her home, her other job, and the firm's premise. The firm did not require the worker to personally perform services. The worker stated the firm did not provide training or instruction. As the general manager she had autonomy to determine specific work assignments. She determined methods by which assignments were performed. If problems or complaints arose, the firm would be contacted for problem resolution. There were no reports required. The worker met with staff members Monday through Friday from 3:30pm to 6:00pm. Then worked from home until 9:00pm. She would meet with staff at the harbor and other resources 5 to 8 hours per weekend. Staff meetings were at the her discretion. The firm required the worker to personally perform services.

The firm stated the worker did not lease equipment, space, or a facility. Customers paid the firm. The firm paid the worker a commission rate of pay; a drawing account for advances was not allowed. The firm did not carry workers' compensation insurance on the worker. The worker established the level of payment for the services provided. The worker stated the firm provided office supplies and equipment. She did not incur expenses. The firm paid the worker a salary rate of pay. The firm established the level of payment for the services provided.

The firm stated the work relationship could be terminated without penalty. The worker did not perform similar services for others. The worker did not advertise. The work relationship ended when the worker was fired. The worker stated the benefit of paid vacations, paid holidays, sick pay, and insurance benefits were made available to her. The firm represented the worker as an employee 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.

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.

A person who can realize a profit or suffer a loss as a result of his or her services is generally an independent contractor, while the person who cannot is an employee. "Profit or loss" implies the use of capital by a person in an independent business of his or her own. The risk that a worker will not receive payment for his or her services, however, is common to both independent contractors and employees and, thus, does not constitute a sufficient economic risk to support treatment as an independent contractor. If a worker loses payment from the firm's customer for poor work, the firm shares the risk of such loss. Control of the firm over the worker would be necessary in order to reduce the risk of financial loss to the firm. The opportunity for higher earnings or of gain or loss from a commission arrangement is not considered profit or 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.