

SS-8 Determination—Determination for Public Inspection

Occupation Managers/Supervisors/Administrators	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 is seeking a determination of worker classification for services performed as an accounts manager for the firm from June 2018 until May 2020. The worker received a 1099-MISC for each year they performed services. The worker feels that they were misclassified by the firm because the firm directed and controlled the worker's performance and set the worker's salary. The worker attached a copy of the agreement between the parties, an email exchange, job offer letter, salary schedule, and a company hierarchy chart.

The firm states that it is a medical transcription company. The worker was requested to review work performed by medical transcriptionists, assign work to available transcriptionists, determine workflow, perform some medical transcription services, and interface with clients. The firm believes that the worker was an independent contractor because the worker could set their own schedule, could work for others, was not supervised, used their own tools, negotiated their rates, and did not work on-site. The firm provided a copy of the agreement between the parties.

The firm states that they did not provide training to the worker. The worker received job assignments directly from the client. The worker determined the methods by which jobs were performed and the client was responsible for problem resolution. The firm states that there were no reports required of the worker. The firm was unaware of the worker's schedule as all job duties were performed at the worker's location. The worker attended conference calls with clients and the firm to discuss work. The firm states that they required the worker to perform services personally. Helpers and substitutes were not applicable to the job situation. The worker states that the firm provided the worker with written and verbal instructions on their job. The worker received job assignments through a duty list and weekly calls and emails. The firm's owner and clients determined the methods by which jobs were performed. If the worker encountered problems or complaints while working, they were required to contact the firm's owner for problem resolution. The worker provided the firm with spreadsheets, emails, and phone call meetings. The worker provided services 7 days a week, from 8am until 10-11pm. Job duties were performed at the worker's home. The worker was required to attend mandatory Monday morning meetings via phone and client calls monthly or as needed. The worker was required to personally perform services.

The firm states that they provided nothing, and the worker provided the office space, computer, utilities, training, operating system, and internet access. The client provided software access. The firm was unaware of any expenses beyond equipment and utilities that the worker may have incurred. The firm states that they paid the worker on a lump sum and piece work basis and that the worker had no access to a drawing account for advances. Customers paid the firm for services provided. The firm carried worker's compensation insurance on the worker. The worker faced the possible financial risk of loss or damage to equipment, or extra time spent on deliverables above and beyond the fee charged for services. The firm states that the worker did not establish the level of payment for services provided. The worker states that they provided a computer and phone and did not lease anything. The worker's expenses were computer equipment and internet access. Software was provided by the firm's client. The worker was paid a salary by the firm, and received it bi-monthly through direct deposit. The worker states that the only economic loss they faced was the possibility of loss of salary. The firm had a preset amount set regarding the level of payment for services provided.

The firm states that they did not offer the worker any benefits. The relationship between the parties could be terminated by either party without liability or penalty. The firm states that the worker did perform similar services for other firms and did not need approval from the firm to do so. There were no non-compete agreements between the parties, just a non-disclosure agreement regarding confidential information. The worker was not a member of a union and the firm was unaware of any advertising done by the worker. The firm states that the worker was represented under the firm's name. The work relationship ended when the worker terminated their relationship with the firm. The worker states that there were incentives offered in the contract between the parties that were never realized. The worker states that they did not perform similar services for other firms. The worker states that they did not advertise their services to the public. The worker was represented by the firm as a manager performing services under the firm's name, which was evident on their email signature. The worker quit due to a salary cut.

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 of medical transcription. The firm provided work assignments by virtue of the clients served, required the worker to report on services performed and attend 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, day, 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. Based on the salary 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.