

SS-8 Determination—Determination for Public Inspection

Occupation 04MAN Manager	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 a manager for the firm from August 2019 until January 2020. The worker received a 1099-MISC in 2019 and a 1099-NEC in 2020. The worker feels that they were misclassified by the firm as an independent contractor because the work relationship fit a 20-factor test that the IRS has previously established to determine an employer-employee relationship. There were no written agreements between the parties. The worker provided a copy of their daily pay listing for the duration of the work relationship, the job listing which demonstrates a salary pay, and an email job offer letter from the firm to the worker.

The firm states that it facilitates E-commerce sales of socks to customers. The worker was requested to help with translations for Spanish language listings and provide assistance with listings and inventory management. The firm feels that the worker was an independent contractor due to specific language skills the worker used for their job duties, as well as the fact that the worker had similar ongoing projects outside of the work relationship.

The firm states that the worker was not provided with any additional training beyond the skills the worker already had. The worker was given specific assignments by the firm. The worker would perform their job duties and report back on completion of assignments. The worker used their own methodology to perform services. If the worker encountered problems or complaints while working, they were required to contact the firm's manager for problem resolution. The worker's project completions were visually verifiable, such as a tally on an inventory spreadsheet or a translated listing. The worker's job duties involved completing listing translations and providing inventory management. There were set tasks that required completion by the worker, and the worker was required to be onsite to perform all job duties. There were no meetings required of the worker and the worker was required to perform all services personally. Substitutes could be hired and paid by the worker. The worker states that the firm provided training on how to use the inventory system, excel spreadsheets, and inputting data on websites. The worker's job assignments were provided by the firm's lead manager. The firm's owner determined the methods by which jobs were performed. The lead manager and firm owner were responsible for problem resolution. The worker provided the firm with excel reports of inventory. The worker's job schedule was Monday through Friday, from 9:30am until 6pm with a half-hour lunch. All job duties were performed at the firm's premises. The worker was required to attend weekly staff meetings and to perform services personally. The worker states that substitutes were not applicable to the job situation.

The firm states that they provided a computer because the firm's digital assets were stored on them. The worker did not lease any space, facilities, or equipment. The firm states that they paid the worker contractor pay but does not specify what that entailed. Customers paid the firm for services provided. The firm did carry worker's compensation insurance on the worker. The worker did not have any exposure to economic loss or financial risk. The firm established the level of payment for services provided. The worker states that the firm provided computer equipment, tape, boxes, knives, software, inventory, and a desk. The worker did not provide anything, and the only expenses incurred were auto expenses for trips to deliver shipments to the UPS store. The worker was paid a salary with no access to a drawing account for advances. Customers paid the firm for services provided. The worker faced no economic loss or financial risk.

The firm states that the relationship between the parties could be terminated by either party without liability or penalty. The firm states that the worker performed similar services for other firms during the work relationship and did not need approval from the firm to do so. The worker was required by the firm to disclose to the firm any conflict-of-interest situations regarding offering services to other firms. The worker was not a member of a union. The worker was not required to interact with customers of the firm. The worker quit and ended the work relationship. The worker states that they were offered paid vacations, paid holidays, and personal days as job benefits. 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 states that they performed services under the firm's name. The worker quit and ended the work relationship.

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, co-adventurer, 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. The firm provided work assignments by virtue of the customers served, required the worker to report on services performed, 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.