

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 a campaign manager for the firm from April 2019 until December 2019. The worker received a 1099-MISC from the firm for 2019. The worker feels that they were misclassified by the firm as an independent contractor because they maintained office hours set by the firm, were given a desk by the firm, and used the firm's email address, copy machine, and phone. The worker did not have a copy of a written agreement between the parties.

The firm states that they contracted with their client, a school, to provide fundraising services. The worker was requested to provide the firm with administrative and campaign support. The firm classified the worker as an independent contractor because the worker set their own hours, determined how to perform their job duties, used their own phone and computer, and never received any benefits. The worker was paid through personal checks, which the firm attached copies of for our consideration. The firm also attached copies of invoices that the firm submitted to their client, the school, which referenced payments for the worker, since they were unable to find the 1099-MISC they issued the worker. There were no written agreements between the parties. The firm attached a copy of the worker's development responsibilities in addition to the previous documentation.

The firm states that they trained the worker on how to use the fundraising database, how to find information, methods for disseminating information, and who to contact if they had questions or needed support. The firm and the worker held weekly meetings where they would discuss weekly job tasks, and they loosely followed an annual development schedule, which the firm attached. The worker determined how they would perform their job duties. If the worker encountered any problems or complaints while working, they were required to contact the firm owner or the school headmaster for problem resolution. The worker was not required to provide the firm with any reports but was required to account for all donations to the school using a database. The worker did not have a daily routine other than weekly meetings, and the worker would determine their own workload and hours. The worker would perform services wherever they wanted, approximately 30% at school and 70% from their home or local coffee shop. The worker was requested to attend weekly meetings and was encouraged to attend monthly school board meetings. The firm did not require the worker to personally perform services. The worker could hire and pay their own helpers and substitutes with approval from the firm's client. The worker states that they received on the job training. The worker received job assignments from the firm's supervisor. The firm determined the methods by which job assignments were performed and assumed responsibility for problem resolution. The worker was required to maintain fundraising reports and payment reports, which were kept online. The worker kept office hours set by the firm and was required to keep appointments made by the firm and worker. The worker performed services at the firm's premises, off-site meetings, and home. The worker attended weekly staff meetings set by the firm. If they did not attend, they would lose their job. The firm required the worker to perform services personally. The firm was responsible for hiring and paying all helpers and substitutes.

The firm states that they did not provide anything, and the worker provided their computer and phone. The client provided office equipment, desk space, and computer programs. The worker did not lease anything. The worker's expenses were personal expenses and any technology expense. The firm's client reimbursed the worker for pre-approved supplies expenses. The worker was paid initially with an hourly wage and was converted to being paid a salary by the firm. The worker did not have access to a drawing account for advances. Customers paid the firm. The firm did not carry worker's compensation insurance on the worker. The worker faced the potential economic loss of damage or loss of personal equipment. The firm and worker agreed on a payment structure prior to the worker starting work for the firm. The worker states that the firm provided a desk, copy machine, pencils, and postage. The worker did not provide or lease anything for their job duties, nor did they incur any expenses. The worker was paid a salary by the firm. Customers paid the firm. The worker had no exposure to economic loss or financial risk. The firm and school established the level of payment for services provided.

The firm states that the relationship between the parties could be terminated by either party without liability or penalty. The worker did not perform similar services for other firms and there were no non-compete agreements in place between the parties. The worker was not a member of a union and did not advertise their services to the public. Supplies were provided by the firm's client. The worker represented themselves to the school community. The worker was terminated because they could not meet the job requirements or fulfill their job responsibilities. The worker was responsible for explaining to new school families annual fundraising campaigns. The worker states that they were offered paid vacations by the firm. The worker was advertised on the school's website and had a school email address. The worker was represented by the firm as a representative. The worker was fired, and thus the work relationship ended.

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 fundraising campaign's needs, required the worker to report on services performed through financial reports, 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 firm and its client provided all materials, supplies, and equipment needed for the worker's job duties. 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 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. 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.