

SS-8 Determination—Determination for Public Inspection

Occupation

Managers/Supervisors/Administrators

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 firm is an entity that is a magazine subscription agency. They deal mainly with corporate customers, public schools, and prisons. The firm engaged the worker as a managing director from 12/2018 to 9/2019. The firm's perspective is the worker was able to set her own hours, place of work, had the choice to use equipment provided by the firm or her own, billed the firm bi-weekly for her hours and worker with no supervision. Therefore, the treatment of the worker as an independent contractor was appropriate. The worker's perspective is she performed day to day services to operate the firm and all expenses incurred by the worker to perform those services were reimbursed by the firm. Therefore, she should be an employee for federal tax purposes. This was pursuant to a written agreement between the parties. The worker submitted a Form SS-8 after receiving a Form 1099-Misc from the firm. The firm replied with a Form SS-8.

The firm provided training, instructions as to the details and means by which the worker was to perform the services. The firm stated the worker would receive her work assignments from the firm's customers based on orders and customer inquiries. The worker specified procedures were in place on how assignments were to be performed. She worked 4 days a week on average of 6 hours a day. She would handle customer inquiries, place orders, handle payments, reconcile batch orders and maintain the firm's database. According to the firm, the worker did not have a set schedule. She was responsible for placing orders and handling customers services issues. She received remuneration for her services. The firm was responsible for problem resolution. The worker was not required to submit any reports. She performed the services on the firm's premises. The worker was able to also work remotely if she chose. The worker was not required to attend any meetings. The relationship between the parties was continuous, as opposed to a one-time transaction. The nature of this relationship contemplated that the worker would perform the services personally. The worker worked exclusively and on a continuing basis for the firm. The worker was able to pursue other employment opportunities if desired. Her services were an integral and necessary part of the services the firm provided to its customers. The parties disagree on the hiring any paying of substitutes or helpers. The worker specified it was the firm's responsibility whereas the firm stated the worker was able to hire any substitutes or helpers. The firm stated the firm would pay the substitutes or helpers, but it was not applicable in this case.

The firm furnished the worker with office space and equipment, at no expense to her. The worker did not lease equipment. The worker stated the firm determined the fees to be charged. However, the firm asserted the worker was able to determine pricing according to the industry standards. The worker did not incur significant business expenses. The firm reimbursed the worker for bus fare she incurred to get to the firm's office. The worker was paid an hourly wage. In the agreement provided by the firm, the worker was eligible to receive cash bonuses for commissionable sales. The firm indicated they gave the worker severance pay of [REDACTED] when the firm's office closed. The firm did not allow the worker a drawing account, or advances against anticipated earnings. The firm's customers paid the firm. The firm did not carry worker's compensation insurance on the worker. The worker did not have a substantial investment in equipment or facilities used in the work and did not assume the usual business risks of an independent enterprise.

The worker was not eligible for sick pay, vacation pay or bonuses. According to the firm, they provided the worker with a [REDACTED] stipend to pay for the worker's health insurance. Either party could terminate the work relationship at any time without incurring a penalty or liability. There was not a "non-compete" agreement between the parties. The worker was not a member of a union. According to internal research, the worker did not perform the services for others. She did not advertise her services to the public or maintain an office, shop, or other place of business. She was required to perform the services under the name of the firm and for the firm's customers. The relationship between the parties ended when the firm closed the office.

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.

In determining whether an individual is an employee or an independent contractor under the common law, all evidence of both control and lack of control or independence must be considered. We must examine the relationship of the worker and the business. We consider facts that show a right to direct or control how the worker performs the specific tasks for which he or she is hired, who controls the financial aspects of the worker's activities, and how the parties perceive their relationship. The degree of importance of each factor varies depending on the occupation and the context in which the services are performed.

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.

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. 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.

A continuing relationship between the worker and the person or persons for whom the services are performed indicates that an employer-employee relationship exists. A continuing relationship may exist where work is performed in frequently recurring although irregular intervals.

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.

While the firm provided the worker with freedom of action as to when she performed her services, this in and of itself does not determine the worker's status as an independent contractor. The whole relationship needed to be analyzed to determine the worker's correct employment tax status. An important factor of determining a worker's status is who had the contractual relationship with the customers and whom did the customers pay. In this case, that relationship was between the firm and their customers.

Factors that illustrate whether there is a right to direct and control the financial aspects of the worker's activities include significant investment, unreimbursed expenses, the methods of payment, and the opportunity for profit or loss. In this case, the worker did not invest capital or assume business risks, and therefore, did not have the opportunity to realize a profit or incur a loss as a result of the services provided.

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.

Based on the common-law principles, the firm had the right to direct and control the worker. The worker shall be found to be an employee for Federal tax purposes.

The firm can obtain additional information related to worker classification online at www.irs.gov; Publication 4341.