

**SS-8 Determination—Determination for Public Inspection**

Occupation

04OPC Other Person in Charge

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 initiated the request for a determination of her work status as a curator of a museum; in this capacity, she performed office work, general cleaning, research, served as a tour guide, etc. in tax years 2013 through 2016. The firm's business is described as a local history museum; the city owns the house and grounds and the historical society owns the artifacts.

The firm's response was signed by the treasurer. The firm's business is described as non-profit museum under IRC Sec 501 (c ) 3. The worker performed services as a curator of the museum.

Both parties provided copies of the contract for services as a curator: she was to provide services as an Independent Contractor and was responsible for all taxes; services were to be rendered independently to a standard that is acceptable to the board; performance to be reviewed at regular board of directors meetings to determine retention and any increase in compensation; and minor petty cash purchases, to be promptly reimbursed by the firm. in this position she was to coordinate working hours with hours that museum is open; coordinate volunteers; handle routine mail, correspondence and telephone messages; maintain accurate membership and mailing lists; compile and maintain routine statistical records and reports; record petty cash transactions and museum sales; track inventory of supplies, literature for distribution, and sales materials and generate requests for purchases, as necessary; coordinate monthly interior museum cleaning and maintenance – restroom cleaned, floors are swept, dusted; etc. Her compensation was at an hourly rate and not to exceed X number of hours per month; it changed from year to year and the contract for that year.

According to the firm, she was given training on the Past Perfect Museum Program. The worker's work assignments were per the contract. The worker determined the methods to be used to perform tasks; however, in the event of a problem she would contact the president of the board. The worker was required to submit museum reports to the board. Her daily routine was per the contract. The worker was required to attend bi-monthly meetings. The worker's services were rendered at the museum and she was required to perform the services personally.

The worker concurred with the firm that her tasks were outlined in the contract; however, she indicated the firm determined the methods by which her services were performed. Any problems or complaints encountered by the worker were directed to the firm for resolution. She also noted that time sheets were remitted to the firm outlining tasked performed and the hours worked. She agreed the services were rendered on the firm's premises and that she was required to perform the services personally. Additional personnel were usually volunteers.

Both parties acknowledged that the firm provided an office, computer, and all supplies; the worker did not furnish anything and did not incur expenses in the performance of the job. The worker was paid an hourly wage per the contract ; the customers paid the firm. The worker was not at risk for a financial loss in this work relationship. The worker did not establish the level of payment for services provided or the products sold.

There were no benefits extended to the worker. Either party could terminate the work relationship without incurring a liability or penalty. The worker was not performing same or similar services for others during the same time frame.

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## Analysis

A worker who is required to comply with another person's instructions about when, where, and how he or she is to work is ordinarily an employee. This control factor is present if the person or persons for whom the services are performed have the right to require compliance with instructions. Some employees may work without receiving instructions because they are highly proficient and conscientious workers or because the duties are so simple or familiar to them. Furthermore, the instructions, that show how to reach the desired results, may have been oral and given only once at the beginning of the relationship.

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. 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.

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.

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.

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.

The firm's statement that the worker was an independent contractor pursuant to an 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.

We have considered the information provided by both parties to this work relationship. In this case, the firm retained the right to change the worker's methods and to direct the worker to the extent necessary to protect its financial investment and business reputation and to ensure its customers' satisfaction. The worker was not operating a separate and distinct business; 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. 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.

## CONCLUSION

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.