

SS-8 Determination—Determination for Public Inspection

Occupation

Personal Service Providers

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 submitted a request for a determination of worker status in regard to services performed for the firm from May 2019 to December 2019 as a caregiver. The firm issued the worker Form 1099-MISC for 2019. The worker filed Form SS-8 as they believe they received Form 1099-MISC in error because they fit the qualifications of a household employee. There was no written agreement between the parties.

The firm's response states it is an individual household. The work provided by the worker was caregiver services for a patient. The worker was requested to perform caregiver services such as assisting with feeding, dressing, hygiene, and health management. The firm states that the worker provided services on a part-time basis but became a full-time W-2 employee as the patient declined.

The firm states that they did not provide the worker with any instruction or training but that they relied solely on the worker's expertise. The work assignments were determined based upon the needs of the patient. The firm states that the worker determined the methods by which tasks were performed. The worker and the patient would jointly resolve any issues that arose, and the firm would be informed of any resolutions taken. There were no reports required of the worker. The worker's routine was determined based upon the caregiving needs of the patient. All work was performed in the individual's home. There were no meetings required and the worker was required to perform all services personally. The worker was required to find any substitutes needed if they could not perform services, and the firm paid all helpers needed. The worker states that they were trained in how to feed and bathe the patient through demonstration. The worker was instructed to take the patient for walks frequently. The routine was established by the firm, and while slight deviations might occur, the expectations of care did not change. The firm determined the methods by which jobs were done and was responsible for problem resolution. The worker would enter the patient's home at 8am, get the patient out of bed and bathe them, feed the patient breakfast, walk around the neighborhood for exercise, and then feed the patient lunch and brush their teeth. The worker's workday ended at 1:30pm. The individual's home and neighborhood were where all job duties were performed. The worker would provide face to face updates on daily occurrences with the firm. The firm had to approve any helpers that the worker would refer for assistance, and the firm would be responsible for payment.

The firm states that they paid for all the patient's needs and the worker only had to determine what was needed regarding supplies, equipment and materials. The firm paid for everything necessary for the job duties. The worker was paid after submitting hours worked to the firm and they did not have access to a drawing account for advances. Customers were not applicable to the work relationship. The worker set the level of payment for services rendered. The worker states that the firm provided all household items used to care for the patient in their residence. The worker did not lease any space, facilities, or equipment and did not incur any expenses. If the patient was taken to a restaurant and the worker paid the bill, the firm would reimburse the cost incurred. The worker was paid an hourly wage and did not have access to a drawing account for advances. The firm did not carry worker's compensation insurance on the worker. The worker faced no economic loss or financial risk and the firm set the level of payment for services rendered to the patient.

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 provided similar services to other individuals during the work relationship and did not need approval from the firm to do so. There were no non-compete agreements in place between the parties. The worker was not a member of a union. There was no representation of the worker by the firm as there were no customers. The worker was reclassified to a W-2 voluntarily by the firm in the following year as the result of a deteriorating diagnosis of the patient needing full-time care. The worker states that they were not provided with any benefits and that they did not perform similar services for other individuals during the work relationship. The worker did not advertise their services to the public. The work relationship was still ongoing through the next year after the worker was reclassified to a W-2 employee by the firm.

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. The firm provided work assignments based upon the individual needs of the firm 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. The firm required the worker to report their hours to the firm in order to be paid. 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. The firm provided everything needed for the worker to provide caregiver duties, and reimbursed the worker for any expenses incurred on the job as a result of these duties. 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. 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.