

SS-8 Determination—Determination for Public Inspection

Occupation

05ITE Assistant instructor

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 a member chapter to an organization that supports the construction industry in areas of regulation, policies, safety and education. It also participated in an apprenticeship program used by its members. The worker was engaged as an apprenticeship program instructor assistant. She received a Form 1099-MISC for her services during the years of 2012 through 2017; she continues to provide her services in 2018 as well. There was no written agreement.

The firm noted that it only provided the [REDACTED] curriculum. The worker agreed that the firm dictated the type of training as well as what days of the week and hours that the classes were offered, who received training, where it took place and addressed any discipline issues. From information gathered, it was the firm that established the requirements for the participants prior to entering the apprenticeship program. The worker received her instructional work assignment from the firm in person, by phone, text or email. The firm noted she received her work assignments from the instructor based on apprentice needs. The worker indicated that that the director of the apprentice training determined the method by which the assignments were performed and would be contacted if any issues or problems arose. The worker reported via email or phone call every class day about who was in attendance, if any problems, and supplies need. The firm indicated that she provided invoices for her services. She had a set hourly work routine taking attendance, tutoring, testing, issuing books and writing reports - all done at the firm's location. The firm's response was that it scheduled classes, coordinating with an instructor at the firm's location. There was disagreement on whether there were staff meetings. Both parties agreed that the worker was to personally provide the services; only the worker noted that the firm would hire and pay any substitutes.

Both the firm and the worker agreed that the firm provided the curriculum, books, training guide, material, supplies and computer as well as the building and classroom. Both also agreed that the worker was paid an hourly rate and had no other economic risk. Both agreed that the worker established the level of payment for services although the firm indicated that the worker's rate was negotiated.

Both the firm and the worker agreed that there were no benefits and that either party could terminate the relationship without incurring a liability. The worker did not perform similar services for others although the firm disagreed. The worker noted that she was represented as an instructor under the firm's name; firm indicated similarly but that the worker was represented as an independent contractor for the firm. Both agreed that the relationship has not ended.

Analysis

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. The relationship of the worker and the business must be examined. 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 should be considered. The determination of the worker's status, then, rests on the weight given to the factors, keeping in mind that no one factor rules. The degree of importance of each factor varies depending on the occupation and the circumstances.

Factors that illustrate whether there is a right to control how a worker performs a task include training and instructions. 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 mission and programming. The firm obtained the participants who met its requirements to enter the firm's apprenticeship program. While the scheduling may have been convenient to the worker, the firm retained the right to change that schedule as evidenced from information provided that the firm changed the day and time at one-point; understandable, as it was their program. The worker worked part-time when needed. While the establishment of set hours of work by the person or persons for whom the services are performed is a factor indicating control, if the nature of the occupation makes fixed hours impractical, a requirement that workers be on the job at certain times is an element of control. The worker provided her services at the firm's location, another factor suggesting the ability to control the worker. The worker was to provide the services personally indicating that the firm was interested in the methods used to accomplish the work as well as in the results. There was a continuing relationship between the worker and firm indicating that an employer-employee relationship exists. A continuing relationship may exist where work is performed in frequently recurring although irregular intervals.

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. It was the firm that had the investment in the workplace, workspace, equipment, tools, and supplies. The worker simply received an hourly rate of pay and had no other economic risk. 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. While it is acknowledged that there were 'invoices' to the firm, the document provided reported the worker's hours and days, in essence, a time sheet/record.

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. There were no benefits and there was no written agreement between the worker and the firm. The worker was assistant instructor in the firm's apprenticeship program. When providing these services, the worker was not engaged in an separate business venture. Integration of the worker's services into the business/organization's 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.

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.

Please see Publication 4341 for guidance and instructions for firm compliance.