

SS-8 Determination—Determination for Public Inspection

Occupation

05ITE Instructors/Teachers

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**

Information provided indicates the firm is fitness gym open 24 hours to its members. The worker provided services as a certified personal trainer, she provided personal training, group training, fitness consultation, group fitness classes, helps with new member enrollment/sales, if needed and ensures a safe and clean environment for her clients and gym members for tax years 2015 through 2018. The firm indicated she was an independent contractor and reported the income paid on Form 1099-MISC. The firm stated she was employed elsewhere when she first started work so could only work part time and she signed an independent contract agreement, (copy provided). The firm stated she advertised her services with her own business cards in two locations at the firm, near the entrance and in PT office. She supplied her own liability insurance. She provided her own CPR/AED/First Aid Certification. she brought her own clients to the club for training. She could charge whatever rates for her services. The firm has standard rates for PT service. She could use those rates or charge a lower/higher rate based on her client's needs or her financial goals. The worker was 100% in charge of her schedule. She would come and go based on her personal and client schedules. She would abruptly disappear for weeks for personal issues. The firm did not pry or request a reason for the absence, she simply resumed her PT services when she returned. She did file a DI claim with the state for her absence on one occasion. She completed form W-9. The firm paid the worker bi-weekly per the agreed contract, and gave her 100% of what she earned. They withheld no taxes. Although not required she attended three to four meetings during 2015-2017 to learn about software program firm was utilizing, gym activities and a food service the firm was introducing for members. The worker had no annual reviews, unlike firm employees. the firm had additional PT contractors also. The worker brought her own clients, or is given a list of names of gym members that she could contact to set up fitness consultations, or PT contracts. The worker had no quotas, was free to call whom she chose, if they were not already assigned to others. The worker schedules her own clients and created her own workouts. She would contact the PT manager or owner if she needed help with a problem. She only needed to provide information of her rendered services and any administrative (calling prospective clients, etc.) or hours she used to support her clients at the gym so she could be compensated. Her schedule allowed her to work during the day while her kids were in school. She requested more billable hours. The firm allotted Tuesday and Thursday for periods when the worker could come in to the gym to help when she was available. This was not a mandatory work shift typical of an employee and she could come and go as she pleased. The extra hours were to provide additional income as needed. The worker would find her own replacement, otherwise the client would wait until the worker returned from her absence. The firm indicated either the firm or worker would pay the sub if needed, there was no current policy for that. The firm indicated the worker was required to perform her services personally. The firm stated if the worker paid the sub, the firm would pay the worker from funds collected from clients using CRM. The firm indicated they provided all gym equipment and key fobs. The worker did not lease space, the firm allows the worker to use all the gym facility, with mutual compensation from funds collected from clients through CRM. (60% for worker, 40% for the firm. She must maintain her own licenses, insurances, continuing education, PT and Safety certifications. The worker received a commission for rendered personal training. She also is paid twelve dollars an hour for all administrative work related to clients and helping at the gym. The clients pay the firm. The firm indicated all clients are entered into the firm's CRM system for appropriate accounting/accuracy. The clients are billed monthly for PT services and collected funds stored to pay firm and workers. The worker is paid from the balance in CRM for rendered PT services. The worker calls and emails potential clients to set up a fitness consultation. the worker also meets potential clients when she is training others in the gym. The worker communicates who she trains and any administrative/club hours for compensation through the firm's CRM. The worker is represented as a certified personal trainer with a photo and biography outside of the PT office. the worker is still employed by the firm as of June 2018.

The worker indicated she had opening gym duties, unlocking door, turning on phones and computers, and cleaning. She sold membership sales, provided workout programs for clients, answered phones, and helped with daily club operations. She indicated she was expected to be there at a certain time by the owner. She indicated there were very little verbal instructions, a binder with specific lists of duties was available. She was required to provide daily progress reports. She indicated she attended to personal training schedules and be sure to be at the gym to unlock the door for business by ten am. on Tuesday / Thursday. Admin/sales was between ten and two. All leads were entered into the firm's computer. Work was performed on the firm premises. Staff meetings were held every few months. She was required to perform her services personally. The firm provided the facility and equipment. She did not lease the facility. She agreed she provided and paid for her personal training certificate, CPR, AED certification and insurance. She was paid on a 60/40 percentage basis. The customer paid the firm. No additional benefits were given. Either party could terminate the work relationship without incurring a penalty or liability. She was represented as a contractor, under the firm's business name. The worker was still employed at the time the work classification determination was requested.

Analysis

The question of whether an individual is an independent contractor or an employee is one that is determined through consideration of the facts of a particular case along with the application of law and regulations for worker classification issues, known as “common law.” Common law flows chiefly from court decisions and is a major part of the justice system of the United States. Under the common law, the treatment of a worker as an independent contractor or an employee originates from the legal definitions developed in the law and it depends on the payer’s right to direct and control the worker in the performance of his or her duties. Section 3121(d)(2) of the Code provides that the term “employee” means any individual defined as an employee by using the usual common law rules.

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.

Therefore, your 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.

- 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.
- 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.

We have applied the above law to the information submitted. As is the case in almost all worker classification cases, some facts point to an employment relationship while other facts indicate independent contractor status. 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.

Evidence of control generally falls into three categories: behavioral control, financial control, and relationship of the parties, which are collectively referred to as the categories of evidence. In weighing the evidence, careful consideration has been given to the factors outlined below.

Factors that illustrate whether there is a right to control how a worker performs a task include training and instructions. In this case, you retained the right to change the worker’s methods and to direct the worker to the extent necessary to protect your financial investment.

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 your business. Both parties retained the right to terminate the work relationship at any time without incurring a liability.

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. The fact the worker paid for her own training, insurance and certifications, does not make her an independent contractor. Any licensed practitioner, such as personal trainers, nurses, electricians, pay for their individual training and license expenses. The firm provided a copy of the independent contract agreement. That contract outlined, what was to be done, the rates of pay that would be paid and when, the rules and regulations the worker was to follow, to include be on time. (hence not in charge of her own schedule). The worker in fact received a raise from the 2015 contract to the 2017 contract. All work was to be processed through the firm’s accounting systems. All payments went through the firm’s payment systems. Had all work been performed as an independent contractor, she would have paid the firm a set rental fee for use of the space. All prices would have been set by the worker, charged by the worker and paid directly to the worker, with no involvement by the firm. Nor would her clients be registered by the firm. We find the services performed were performed under the firm’s business name and reputation, to “benefit” the firm’s on-going business practices.