

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**

The worker submitted a request for a determination of worker status in regard to services performed for the firm from 2012 to 2015 as a CNA and LPN instructor. The firm issued the worker Form 1099-MISC for the years in question. The worker filed Form SS-8 as she believes she erroneously received Form 1099-MISC.

The firm's response states its business is offering classes to the public. The worker was engaged as a nursing instructor. The work done by the worker included developing and delivering content to students. The worker was classified as an independent contractor as she was required to provide her own content, schedule herself, fixed issues on her own, etc. Services were performed under a written agreement; however, a copy could not be located.

The firm stated it did not provide specific training or instruction to the worker as she had to have prior training. The worker chose what she wanted to work. The worker set her schedule and topics. The worker was responsible for handling issues. Reports and meetings were not required. The worker's daily routine consisted of coming in to teach class and leaving. Services were performed in the classroom setting. It is unknown if the worker was required to personally perform services. The worker stated the firm provided her specific instructions, i.e. an outline of classes, dates and times, what to teach, and how to teach it. Work assignments consisted of the same job duties each week. The firm determined the methods by which assignments were performed and it was contacted if problems or complaints arose. The firm was ultimately responsible for resolution. The firm required her to provide grade sheets, attendance records, and clinical performance reviews of students. She performed services on a regularly scheduled basis. Services were performed at the firm's premises and at clinical sites as scheduled by the firm. The firm required her to attend mandatory staff meetings. The firm required her to personally perform services. The firm was responsible for hiring and paying substitutes or helpers.

The firm stated it provided the site to teach. The worker provided books, supplies, and content. The worker did not lease equipment, space, or a facility. If the worker needed anything, she would have purchased it without reimbursement from the firm. Customers paid the firm. The firm paid the worker piece work and pre-determined hours. The worker was not allowed a drawing account for advances. The firm did not carry workers' compensation insurance on the worker. The firm and worker negotiated pay for new classes. The worker stated the firm provided the location, classes, books, students, supplies, clinical locations, and testing supplies. She provided and incurred the unreimbursed expense associated with her phone, uniforms, and computer. The firm paid her both salary and an hourly rate of pay during the term of the work relationship. She did not incur economic loss or financial risk. The firm established the level of payment for the services provided.

The firm stated benefits were not made available to the worker. The work relationship could be terminated by either party without liability or penalty. It is unknown if the worker performed similar services for others. There was no agreement prohibiting competition between the firm and worker. The worker advertised with business cards. The firm represented the worker as a contractor to its customers. The work relationship ended when the worker left. The worker stated she did not perform similar services for others or advertise. The firm represented her as an employee to its customers. Services were performed under the firm's business name. She quit.

The firm stated the worker was not responsible for soliciting new customers; however, it encouraged her to do so. The worker stated she helped the firm create a flier. The firm approved all advertising.

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, the firm's statement that the worker was an independent contractor pursuant to a written 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.

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 teaching services performed by the worker were integral to the firm's business operation. The firm provided work assignments by virtue of the customers served. 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.

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. 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. Based on the piece work or 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, 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. 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.