

**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 payer from January 2018 to March 2019 as an adult literacy instructor. The services performed included teaching language arts to adult students. The payer issued the worker Form 1099-MISC and Form W-2 for 2018; tax reporting documents for 2019 were not provided for our review. The worker filed Form SS-8 to determine her worker classification. She believes she erroneously received Form 1099-MISC.

The payer's response states its business is education and training services for adult students. In January 2018, the worker was engaged as an adult literacy instructor. Hours were paid under a grant and the worker was classified as an independent contractor. In May 2018, the worker was transitioned to the position of [REDACTED] instructor under a different grant. An employee status form was completed reflecting she would be paid as an employee; however, no benefits were provided. Effective July 1, 2018, the worker was offered and accepted hours to be worked under another grant, which would be paid without taxes withheld. As an employee, the worker was provided instruction to follow a specific curriculum. As an afternoon instructor, she had broad freedom of instruction, therefore, she was classified as an independent contractor.

The payer stated it provided the worker specific instruction and training on specific curriculum, in addition to software curriculum, as needed. The payer informed the worker of student placement in the class. The worker determined the methods by which assignments were performed. If problems or complaints arose, the payer's director of curriculum and executive director, as needed, were contacted and assumed responsibility for problem resolution. Reports included verbal progress reports and email status reports. As a part-time employee, the worker provided instruction to an identified group of students. As an independent contractor, the worker provided adult education instruction to students. Services were performed at the payer's premises. The payer required the worker to attend any staff meetings during contracted hours. There was no penalty if the worker was unable to attend. The worker was not required to attend meetings outside of the contracted hours. The payer required the worker to personally perform services. Hiring substitutes or helpers was not applicable. The worker stated the payer provided her specific instruction to teach reading and writing to adult students in preparation of their [REDACTED] testing. Students showed up Monday through Thursday. She and the payer's assistant director determined the methods by which assignments were performed. Her routine consisted of 8 am to 3:30 pm, Monday through Thursday, and occasionally on Friday. The payer was responsible for hiring and paying substitutes or helpers.

The payer stated it provided a desk, computer, and instructional materials. The worker provided instructional methodology and creative control. The worker did not lease equipment, space, or a facility. The payer was unaware of expenses incurred by the worker. She may have bought or used books or materials from personal sources. The worker's expenses were not reimbursed by the payer. Customers paid the payer. The payer paid the worker an hourly rate of pay; a drawing account for advances was not allowed. The payer did not carry workers' compensation insurance on the worker. The worker did not incur economic loss or financial risk. The worker did not establish the level of payment for the services provided. The worker stated the payer also provided the building. The payer determined the level of payment for the services provided.

The payer stated the work relationship could be terminated by either party without incurring liability or penalty. It is unknown if the worker performed similar services for others; she was not prohibited from doing so. It is unknown if the worker advertised. The payer and worker agreed to contractor status for the work hours. The payer terminated the work relationship. The worker stated she did not perform similar services for others or advertise. The payer represented her as an adult literacy instructor to its customers. Services were performed under the payer's business name.

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## 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 payer's statement that the worker was an independent contractor pursuant to a 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 payer required the worker to personally perform services. Furthermore, the services performed by the worker were integral to the payer's business operation. The payer provided work assignments by virtue of the students served, required the worker to provide progress and status reports, and assumed responsibility for problem resolution. These facts evidence the payer retained the right to direct and control the worker to the extent necessary to ensure satisfactory job performance in a manner acceptable to the payer. Based on the worker's education, past work experience, and work ethic the payer may not have needed to frequently exercise its right to direct and control the worker; however, the facts evidence the payer retained the right to do so if needed.

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 payer 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 payer 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. 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. As acknowledged by the payer, the worker did not incur economic loss or financial risk. 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, but rather the services performed by the worker were a necessary and integral part of the payer'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. It also should not be based on the source of funding for a position. As noted above, common law factors are considered when examining the worker classification issue.

Based on the above analysis, we conclude that the payer 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 payer can obtain additional information related to worker classification online at [www.irs.gov](http://www.irs.gov); Publication 4341.