

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 February 2019 to August 2019 as a [REDACTED] instructor and studio manager. The firm issued the worker Form 1099-MISC for 2019. The worker filed Form SS-8 as he believes he received Form 1099-MISC in error because the firm determined the worker's schedule and rate of pay.

The firm's response states it is a [REDACTED] studio. The work provided by the worker was instruction of [REDACTED]. The worker was requested to perform Pilates instruction to clients of the firm. The firm believes the worker is an independent contractor because the worker set their own schedule, carried their own liability insurance, and came and went to the firm's premises as they pleased. There were no written agreements between the parties.

The firm states that the worker received training on the firm's scheduling system. The firm provided the worker with a suggested schedule. The worker would then use the schedule to arrange sessions with clients that would meet their needs. The firm states that the worker determined the methods by which job assignments were performed. The firm states that the worker was required to contact the firm's owner in the eventuality that they encountered complaints or problems during their job duties, and the solution may involve the firm and the worker. The worker did not have to provide any reports to the firm. The firm states that the worker started working when they wanted and determined their own schedule. All job duties were performed on the firm's premises. The worker did not have to attend any meetings and was required by the firm to provide services personally. Helpers or substitutes were not applicable to the job situation. The worker states that they received no training or instruction from the firm, and the firm determined the methods by which job assignments were performed. The worker was required to contact the firm's owner if they encountered problems for problem resolution. The worker was required to verbally report on clients, exercises taught, and any issues that arose during their job duties. The worker provided services Monday, Tuesday, Thursday, Friday and Saturday at set times. During these times, they would teach [REDACTED] to clients, open and close the studio, schedule and bill clients, and accept client payments on behalf of the firm. The worker was required to attend staff meetings and all services were performed at the firm's [REDACTED] studio location. The worker was required to perform all services personally. Any helpers or substitutes needed were hired and paid by the firm's owner.

The firm states that they provided the worker with the location, apparatus, scheduling program, and computer. The worker only provided services and did not have to lease space, facilities, or equipment. The worker incurred the expense of liability insurance. The worker was paid commission by the firm with no access to a drawing account for advances. The worker was guaranteed an hourly payment of \$50 an hour. Customers paid the firm for all services rendered. The firm did not carry worker's compensation insurance on the worker. The worker faced no exposure to economic loss or financial risk in the performance of their job duties. The firm established the level of payment for all services rendered. The worker states that the firm provided all [REDACTED] exercise equipment, computer scheduling software, a phone, location, and all supplies. The worker only provided their uniform. The worker incurred travel expenses, uniform and clothing expenses, continuing education, and personal [REDACTED] lessons expenses. The worker was paid commission and an hourly wage. Customers paid the firm and the worker was not exposed to economic loss. The firm set the level of payment for all services rendered.

The firm states that they did not offer the worker any benefits. The relationship could be terminated by either party without liability or loss. The firm states that the worker provided services to others during the course of the work relationship and did not need approval to do so. The worker was not a member of a union. The worker did not advertise their services to the public. The firm represented the worker as a teacher to clients of the firm. Workers would go through a trial period. The firm asked the worker not to return after a situation happened with another worker, resulting in the termination of the relationship. The worker states that the firm initially provided housing for the worker during the first few months of the work relationship. The relationship between the parties could be terminated without liability or penalty. The worker states that they did provide similar services for others during the work relationship. There were no non-compete agreements in place between the parties. The worker was a member of a union that was unrelated to [REDACTED] instruction. The worker did not advertise their services to the public. The worker states that they were represented by the firm as an employee teacher of the firm and a studio manager. The worker states that an issue with a client resulted in the termination of the work relationship between the parties.

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. Furthermore, the services performed by the worker were integral to the firm's business operation of [REDACTED] instruction. The firm provided work assignments by virtue of the customers served, required the worker to verbally report on services performed, 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. 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 and the worker was guaranteed a minimum hourly rate. 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 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.