

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 September 2017 to February 2020 as a personal trainer. The firm issued the worker Form 1099-MISC for 2017 through 2019. The worker filed Form SS-8 as they believe they received Form 1099-MISC in error. The worker provided a copy of a contract and email exchange between the parties.

The firm's response states it offers personal training services. The work provided by the worker was as a personal trainer. The worker was requested to perform trainings and nutritional assistance to clients of the firm. The firm did not provide supervision or direction. The firm provided additional information as well as a copy of the contract between the parties.

The firm states that the worker did not received any training. The firm provided instruction to the worker regarding the firm's sales software and equipment. The worker was responsible for recruiting, scheduling, and completing sessions on their own, although the firm provided the worker with some clients. The firm states that the worker determined how job assignments were completed. The firm states that the worker was responsible for personally handling all complaints and problems encountered during their job duties. The worker was not required to provide the firm with any reports. The worker set their own schedule. The worker performed services at the firm's gym location as well as remote locations. The worker was required to attend occasional monthly meetings and was required to personally perform services. Helpers or substitutes were not applicable to the work situation. The worker states that they were provided with nutrition templates by the firm and were required to keep fitness statistic sheets for each of the firm's clients. The worker was instructed by the firm on how to sell merchandise. The worker would receive job assignments from the firm on a client contact card. The client would then be placed on the worker's workout schedule. The majority of these clients were provided by the firm. The worker and the firm both determined the methods by which these job tasks were performed. The firm determined the location, duration, and rate for each training session. If problems were encountered during the worker's job duties, the worker was required to contact the firm's owner. Depending upon the issue at hand, it was either the firm owner or the worker who would resolve the issue. The worker was required to check clients in and out on an app. The worker was also required to report to the firm's owner on client activity and status. The worker states that all job duties were performed at the firm's gym location, and various training schedules dictated the majority of the day from 5:00am until 7:30pm. The worker was required to attend weekly training meetings that lasted one to two hours and were unpaid. The worker was required to perform all services personally and was unable to hire and pay for any substitutes. The worker was required to ensure that their shifts were covered by another worker if they were unable to perform duties.

The firm states that they provided the worker with basic gym equipment as well as front desk sales equipment. The worker would provide any specialized equipment that was needed. The worker did not have to lease space, facilities or equipment. The worker's expenses included certifications, liability insurance, cell phone, equipment, and athletic clothing. The firm states that the firm would pay the worker based upon the services rendered (personal or group training, classes). The worker was not allowed access to a drawing account for advances. The firm did not carry worker's compensation insurance on the worker. Customers would pay the firm for all services rendered. The firm states that the worker could potentially face financial risks through marketing expenses, damaged equipment, or legal matters. The firm set the level of payment as a set rate for all services rendered. The worker states that all equipment was provided by the firm including workout equipment, a tablet, and a key to the building. The worker purchased clothing with the firm's logo to wear while providing training sessions, which was the worker's only expense. The worker was paid an hourly wage as well as commission if they sold merchandise for the firm. Customers paid the firm and the firm set the level of payment for services rendered by the worker.

The firm states that the provided the worker with bonuses as a benefit. The relationship between the parties could be terminated by either party without liability or penalty. The firm states that the worker did not perform similar services for other firms during the work relationship. There was a non-compete agreement in place between the parties where the worker agreed to not perform services for other firms during the work relationship. The worker was not a member of a union. The worker advertised services for the firm on social media, business cards, and at health fairs. The worker performed services under the firm's name. The firm states that the work relationship ended when the worker quit. The worker states that there was no severability clause in the contract for the worker. The worker did not perform similar services for other firms during the work relationship and was prohibited from doing so through a contract between the parties. The worker was not a member of a union. The worker states that the worker was branded by the firm and represented as employees of the firm to clients. The worker was required to buy and wear clothes branded with the firm's name while performing all training duties. The worker quit, thus ending the work relationship.

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 personal training. The firm provided work assignments by virtue of the customers served, required the worker to 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. 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. The worker was prohibited from providing services to other firms during the work relationship. 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 worker was also required to perform training services while wearing clothing with the firm's logo, thus emphasizing the representation of the worker by the firm as an employee of the firm. 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.