

SS-8 Determination—Determination for Public Inspection

Occupation

Personal Service Providers

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 is seeking a determination of worker classification for services performed as a teacher's assistant from August 2019 until April 2020. The worker received a 1099-MISC from the firm for both 2019 and 2020. The worker feels that they were misclassified as an independent contractor because they had a set schedule, they were paid hourly, and the firm offered vacation benefits. The worker was given tasks that were set in place by the firm. There were no written agreements between the parties.

The firm states that it is a creative arts preschool. The worker was requested to provide services as a part-time teacher, doing art projects with pre-school students. The firm believes that the worker was correctly issued a 1099-MISC because they paid the worker a higher wage to provide services and not have taxes taken out of their pay.

The firm states that they provided no training to the worker. The firm states that the worker had no job assignments, and the worker determined the methods to use to perform their job duties. The firm states that the worker was responsible for resolution of any problems encountered on the job. The worker was not required to provide the firm with any reports. The worker performed services Monday through Friday for four hours a day, teaching art projects and caring for children. All work was performed at the firm's classroom premises. There were no meetings required of the worker, and the firm required the worker to personally provide services. There were no substitutes needed. The worker states that they gained experience on the job while working so training was not needed. The firm's owner gave the worker job assignments and determined the methods by which they were performed. The firm owner was responsible for problem resolution if the worker encountered any problems or complaints. The worker's shift was 9:30am until 1:30pm Monday through Friday. The worker's routine could change daily depending upon the activities planned for the day. The worker performed all services at the firm's premises and there was no possibility of remote work or off-site work. The worker states that they were required to perform services personally. The firm's owner hired and paid all helpers needed.

The firm provided the worker with art supplies, paper, paints, and weaving supplies. The worker did not provide anything for their job duties. The worker did not lease any space, facilities, or equipment, and they did not incur any expenses. The worker was paid an hourly wage with no access to a drawing account for advances. Customers paid the firm for services provided. The firm did not carry worker's compensation insurance on the worker. The worker had no exposure to financial risk or economic loss. The worker and firm established the level of payment for services provided when they negotiated the wage paid to the worker. The worker states that the firm provided all the school supplies used during the worker's job duties. The worker had no expenses and was paid an hourly wage by the firm. The worker states that they had no economic loss or financial risk exposure. The worker states that the firm's owner established the level of payment for services.

The firm states that they did not offer the worker any benefits. The relationship between the parties could be terminated by either party without liability or penalty. The worker did not perform similar services for other firms during the work relationship. There were no non-compete agreements in place between the parties. The worker is not a member of a union. The firm states that the worker represented themselves as an artist online and advertised their creations. The firm represented the worker as a teacher for the firm. The firm states that the worker quit performing services and moved in April of 2020. The worker states that the firm provided paid vacations, sick pay, and paid holidays as benefits. The worker states that they did not provide similar services for other firms and did not advertise their services to the public. The worker states that the firm represented the worker as an assistant teacher performing services under the firm's name.

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. 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. 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.