

SS-8 Determination—Determination for Public Inspection

Occupation Personal Service Providers	Determination: <input checked="" type="checkbox"/> Employee <input type="checkbox"/> Contractor
UILC	Third Party Communication: <input checked="" type="checkbox"/> None <input type="checkbox"/> 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 substitute teacher for the firm from January 2017 until December 2018. The worker received a 1099-MISC for both tax years. The worker believes they were misclassified as an independent contractor because they were told when to provide services, given a set schedule, given an employee handbook, supervised daily by the firm, and went through employee training. The worker provided a copy of an email exchange regarding meeting notes and a copy of an acknowledgement regarding receiving the employee practices handbook. The worker was required to sign an employment contract with the firm.

The firm states that it provides special education services to children. The firm states that the worker was requested to fill in teaching duties when the regular teacher could not perform services for the firm. The firm believes that the worker was an independent contractor because they provided services as needed and could provide similar services as a substitute teacher to other firms during the work relationship. The firm provided invoices and payments that were made to her as additional documentation.

The firm states that there was no specific training provided to the worker. The worker utilized general education and experience for their job duties. The worker would receive job assignments from the firm's operations coordinator. The worker would follow the classroom's special education guidance regarding their job duties. If the worker encountered problems or complaints during their job duties, they were required to contact either the teacher or the education supervisor for problem resolution. No reports were required of the worker. The worker provided services for approximately 6 hours during their workday, in various classrooms of various early childhood learning facilities. There were no meetings required of the worker. The firm states that they required to worker to personally perform services. Helpers and substitutes were not applicable. The worker states that they were required to go through an ABA training program for two full days prior to working for the firm. The worker was supervised daily and had a written evaluation of their job performance done every 3 months. The worker was provided a schedule by the firm and created lesson plans in conjunction with the general education teacher, which was reviewed by the site's supervisor. Two of the firm's supervisors determined the methods by which jobs were performed and assumed responsibility for problem resolution. The worker would complete IEP reports for special education students. The worker's workday would begin with a morning meeting, followed by circle time with students. The worker had a scheduled lunchbreak, followed by outdoor time and naptime for the students. The students would then have a snack and then be dismissed for the day. The worker would attend team meetings in the afternoon once a week. All services were performed at the firm's premises. Weekly staff meetings were required, and the worker was required to perform services personally. The firm was responsible for hiring and paying all helpers needed.

The firm states that the worker and the firm did not provide anything for the job and the worker did not lease anything for their job. The worker did not incur any expenses during their job duties. The firm reimbursed the worker for fingerprinting fees since fingerprints were required when hiring the worker. Customers of the firm paid the firm for services provided. The firm did not carry worker's compensation insurance on the worker and the worker faced no economic loss during their job duties. The firm states that the client set the level of payment for services provided. The worker states that the firm provided the worker with a laptop and all educational supplies needed for the children. The worker did not have to provide anything and did not lease any space, facilities, or equipment for their job duties. The worker was paid an hourly wage by the firm with no access to a drawing account for advances. Customers paid the firm, and the firm did not carry worker's compensation insurance on the worker. The worker faced no financial risk or economic loss during their job duties. The firm set the level of payment for services provided.

The firm states that there were no benefits offered to the worker. The relationship between the parties could be terminated by either party without liability or penalty. The firm did not know if the worker provided similar services to other firms during the work relationship. There were no non-compete agreements in place between the parties. The worker was not a member of a union and did not advertise their services to the public. The firm represented the worker as a substitute teacher providing services for the firm. The work relationship ended when the worker was no longer needed. The worker states that there were no benefits, and the relationship could be terminated by either party without liability or penalty. The worker states that they did provide similar services for other firms during the work relationship and did not need approval from the firm. The worker was required to maintain their full-time schedule with the firm. The worker did not advertise their services to the public. The worker was represented by the firm as an employee of the firm. 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. 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.