

SS-8 Determination—Determination for Public Inspection

Occupation

05ITE Instructor/Teacher

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**

Information provided indicated the firm is an aerial arts training facility. The worker had been retained by the firm as an instructor for tax years 2011 through 2014. The firm reported the income on Form 1099-MISC.

The firm indicated [REDACTED] was a student at OAA for 3 years prior to her approaching them as an independent contractor. The firm indicated they are provided with a W-9 and independent contract. The firm indicated initial safety guidance meeting is scheduled. The instructors and director of the school review and have a discussion on safety executing certain aerial skills that the instructor is proficient in. The firm indicated the worker retains control of when to work, how to teach and creates her lesson plans for each individual client based on their abilities. The teachers select hours and classes they would like to teach. For the hours selected they sign in students, ensure equipment is safe, teach classes. [REDACTED] took over existing class that a previous teacher had. She also opened classes of her choosing. Classes are given at two different firm locations. The firm indicated no meetings are required. The firm pays all individuals. The firm provided all safety related equipment. The firm indicated no space is leased. The parties agreed on \$17.00 per class (contract says \$18.00). The client paid the firm. A 10 day written notice is required. Immediate termination is only in case of serious misconduct or violation of safety protocol. The firm indicated the worker did perform similar services for others. The contract was terminated due to tortuous interference and safety concerns.

The firm provided a copy of the IC agreement established June 2013. The contract states services may be amended by either party. The contractor is required to bill for services. The company will reimburse her for all reasonable and approved out of pocket expenses. The company may request project plans, progress reports and a final results report on a monthly basis. The contract stated they will report directly to [REDACTED] (or designated other). They shall fulfill any other duties reasonably requested by the company and agreed to by the contractor. Payment to be \$18.00 an hour not to exceed \$10,000). The firm provided a copy of the Non-compete, non-solicit agreement. The firm provided a copy of the termination letter from their attorney to the worker. Copy of the "invoice" which basically was a time sheet, and \$17.00 per hour.

The worker has indicated she did not set their own class times. The firm provided mandatory training for all instructors. The worker assignments were determined by the firm. Services were performed on school premises. The worker's were required to wear company T-shirts while teaching. (see memo from firm provided by worker). The firm provided equipment, mats, etc. Paid by the hour. The worker was required to provide class sizes, any accidents. She was required to check e-mails daily for instructions from the firm. The worker has provided twenty five pages of memos from the firm, with directions, instructions, training dates, memos to wear company T shirts while training, company rehearsal times, lists of required conditioning and weekly assignments and goals given by the firm, etc. They were not allowed to work for anyone else while working for the firm. The worker provided a copy of the firm's teacher procedures hand book. The worker provided a copy of a different EMPLOYEE non-complete agreement, than the one provided by the firm.

The question of whether an individual is an independent contractor or an employee is one that is determined through consideration of the facts of a particular case along with the application of law and regulations for worker classification issues, known as "common law." Common law flows chiefly from court decisions and is a major part of the justice system of the United States. Under the common law, the treatment of a worker as an independent contractor or an employee originates from the legal definitions developed in the law and it depends on the payer's right to direct and control the worker in the performance of his or her duties. Section 3121(d)(2) of the Code provides that the term "employee" means any individual defined as an employee by using the usual common law rules.

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. In determining whether an individual is an employee or an independent contractor under the common law, all evidence of both control and lack of control or independence must be considered. We must examine the relationship of the worker and the business. We consider facts that show a right to direct or control how the worker performs the specific tasks for which he or she is hired, who controls the financial aspects of the worker's activities, and how the parties perceive their relationship. The degree of importance of each factor varies depending on the occupation and the context in which the services are performed.

Therefore, your statement that the worker was an independent contractor pursuant to an 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.

Analysis

-A worker who is required to comply with another person's instructions about when, where, and how he or she is to work is ordinarily an employee. This control factor is present if the person or persons for whom the services are performed have the right to require compliance with instructions.

-Training a worker by requiring an experienced employee to work with the worker, by corresponding with the worker, by requiring the worker to attend meetings, or by using other methods, indicates that the person or persons for whom the services are performed want the services performed in a particular method or manner. This is true even if the training was only given once at the beginning of the work relationship. See Rev. Rul. 70-630, 1970-2 C.B. 229. Memos provided by the worker from the firm of mandatory training sessions and scheduled rehearsal times were provided.

-Integration of the worker's services into the business operations generally shows that the worker is subject to direction and control. When the success or continuation of a business depends to an appreciable degree upon the performance of certain services, the workers who perform those services must necessarily be subject to a certain amount of control by the owner of the business.

-The establishment of set hours of work by the person or persons for whom the services are performed is a factor indicating control. If the nature of the occupation makes fixed hours impractical, a requirement that workers be on the job at certain times is an element of control. See Rev. Rul. 73-591, 1973-2 C.B. 337.

-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 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.

ANALYSIS

We have applied the above law to the information submitted. As is the case in almost all worker classification cases, some facts point to an employment relationship while other facts indicate independent contractor status. The determination of the worker's status, then, rests on the weight given to the factors, keeping in mind that no one factor rules. The degree of importance of each factor varies depending on the occupation and the circumstances.

Evidence of control generally falls into three categories: behavioral control, financial control, and relationship of the parties, which are collectively referred to as the categories of evidence. In weighing the evidence, careful consideration has been given to the factors outlined below.

Factors that illustrate whether there is a right to control how a worker performs a task include training and instructions. In this case, you retained the right to change the worker's methods and to direct the worker to the extent necessary to protect your financial investment.

Factors that illustrate whether there is a right to direct and control the financial aspects of the worker's activities include significant investment, unreimbursed expenses, the methods of payment, and the opportunity for profit or loss. In this case, the worker did not invest capital or assume business risks, and therefore, did not have the opportunity to realize a profit or incur a loss as a result of the services provided.

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 your business. Both parties retained the right to terminate the work relationship at any time without incurring a liability.

CONCLUSION

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. Services were performed on the firm premises, under the firm's business name. The firm provided class schedules, determined new classes to be taught, determined the prices charged to the students, provided directions to the teachers as to reminders to the students of payments, documentation of payments etc. The worker were required to wear company attire while teaching. The teacher procedures were provided to the workers. The worker was paid by the hour for each class taught.