

SS-8 Determination—Determination for Public Inspection

Occupation 05ITE.20 Instructor/Teacher	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 submitted a request for a determination of worker status in regard to services performed for the firm from January 2013 to November 2013 as a foreign language instructor or trainer. The work done by the worker included teaching a foreign language to U.S. government employees who were to be posted for a tour-of-duty to the country where the language is spoken. The firm issued the worker Form 1099-MISC for the year in question. The worker filed Form SS-8 as she believes she erroneously received Form 1099-MISC.

The firm's response stated its business is language services, including training courses, ESL, testing immersion courses, translation services, and interpreting services (including American Sign Language). The worker was engaged as a language instructor. She delivered language and cultural competency training to adult students. The worker was an independent contractor as she has a rare skill with a specific foreign language and considerable freedom to teach in her own way, set her work schedule and curriculum, and was free to provide her own teaching materials. Services are typically performed under a written agreement; however, one bearing the worker's signature was not currently traceable in the firm's files.

The firm stated no specific training was provided to the worker. The worker was aware of the students' requirements from the outset. The worker was free to schedule the classes and to use any teaching materials she deemed appropriate. The worker determined the methods by which assignments were performed. The firm assigned the worker a colleague who acted as a point-person if any problems or complaints arose. The firm required the worker to prepare a simple report reviewing the student's academic performance. There were no mandatory meetings. Generally each training period covered four hours. Services were generally performed at the firm's facility; however, the worker may have organized field trips if she chose. The firm required the worker to personally perform services. The firm ultimately approved and paid substitutes or helpers. The worker stated the firm's director-of-operations or training coordinators delivered initial instruction on the teaching methodology and standard-operating-procedures related to mock tests, classroom behavior, etc. Twice a month instructions were provided. The firm provided work assignments to the worker, determined the methods by which assignments were performed, and assumed responsibility for problem resolution. The firm provided the worker a template to provide weekly and monthly written progress reports. The worker performed services, sole at the firm's premises, on a regularly scheduled basis. There were no mandatory meetings; however, twice a month a training coordinator attended classes for a day as a form of quality control.

The firm stated it provided the classroom equipment with AV terminal. The worker may have provided teaching materials, books, movies, and supplies. The worker did not lease equipment, space, or a facility. The worker did not incur significant expenses in performing services for the firm. Customers paid the firm. The firm paid the worker an hourly rate of pay; a drawing account for advances was not allowed. The firm did carry workers' compensation insurance on the worker. The worker had no loss or financial risk beyond the normal parameters stated. The worker established the level of payment for the services provided. The worker stated she did not provide supplies, equipment, or materials. She did not incur expenses, economic loss, or financial risk. She did not establish the level of payment for the services provided.

Benefits were not made available to the worker. The work relationship could be terminated by either party without incurring liability or penalty. The firm stated the worker performed similar services for others; the firm's approval was not required for her to do so. There was no agreement prohibiting competition between the parties. The firm represented the worker to its customers as one with specific foreign language services as a qualified instructor. The worker's services ended when her assignment was completed. The worker stated she did not perform similar services for others or advertise. Services were performed under the firm's business name.

The unsigned agreement stated, in part, a worker agreed to devote all necessary time and attention to the performance of the specific duties. Duties included teaching, preparing for classes, providing internet resources, writing the course syllabus, developing tests and quizzes for the course, and assessing and reporting student performance. All services were to be performed only by the worker. All records, reports, documents, lists, plans, memoranda, notes and other documentation were considered the sole and exclusive property of the firm and were to be returned to the firm upon the termination of the agreement or the written request of the firm.

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.

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. In this case the services performed by the worker were integral to the firm's business operation. The firm retained the right to provide instruction and assumed responsibility for problem resolution, in addition to collecting customer payments for services provided. 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 prior employment relationship with the firm it may not have been necessary for the firm to frequently exercise this right; however, the facts evidence the firm retained the right to do so if needed.

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. 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 salary 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 independent 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.