

SS-8 Determination—Determination for Public Inspection

Occupation

05ITE.79 Instructor/Teacher

Determination:

Employee

Contractor

UILC

Third Party Communication:

None

Yes

Facts of Case

The worker submitted a request for a determination of worker status in regard to services performed for the firm from June 2013 to November 2014 as a teacher and tutor. The firm issued the worker Form 1099-MISC for the years in question. The worker filed Form SS-8 as he believes he erroneously received Form 1099-MISC.

The firm's response stated its business is tutoring and an SAT prep school. The worker was engaged as a tutor. The work done by the worker including tutoring middle school and high school students in college application essay writing, middle school and high school writing, and history and science, using material the worker created at either the firm's site, via online tool, or at off-site locations convenient to clients. The worker had flexibility in time and location of tutoring sessions and used materials he created for the purpose. General time, months when the tutoring was done, was determined by homework, assignment, or test dates, but specific days and time was determined by the student and the worker. The written agreement between the parties is not available.

The firm stated it did not provide specific training or instruction to the worker. The firm contacted the worker via e-mail or telephone in connection with work assignments. The worker determined the methods by which assignments were performed. The worker was not required to contact anyone if problems or complaints arose. Reports and meetings were not required. The worker's daily schedule or hours varied based on demand for tutorial services. The worker worked four to six hours during summer weeks and as little as one or no hours during school weeks when student availability diminished. Services were performed at the firm's premises (50% of the worker's time), worker's office or home via online tools (30%), and customer location or mutually agreed location (20%). The firm required the worker to personally perform services. There was no instance of a substitute or helper. If the worker was unavailable, the work assignment was rescheduled. The worker stated the firm provided annual training. Work assignments were scheduled by the firm. The firm determined the methods by which assignments were performed and assumed responsibility for problem resolution. The worker's routine was Monday through Friday (12 – 6 pm) and Saturday (9 am – 5 pm). Services were performed at the firm's premises. The firm was responsible for hiring substitutes or helpers.

The firm stated its copy machines were made available to the worker to make copies of handouts (if any). The worker provided the curriculum, PowerPoint slides, projectors, laptop, and all other equipment for his sessions. The worker did not lease equipment, space, or a facility. The worker was not reimbursed for any expenses incurred. Customers paid the firm. The firm paid the worker lump sum payments on a monthly basis. A drawing account for advances was not allowed. The firm did not carry workers' compensation insurance on the worker. The worker incurred the economic loss or financial risk associated with loss or damage to his equipment and presentation materials. The worker established the level of payment for the services provided. The worker stated the firm provided teaching materials. The worker did not provide supplies, equipment, or materials. The worker did not incur expenses in the performance of services for the firm. The firm paid the worker salary. The firm established the level of payment for the services provided.

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 the worker to have done so. There was no agreement prohibiting competition between the parties. The worker advertised via e-mail to students and through word-of-mouth. Tutoring sessions done at the worker's home or office were arranged by the worker. The firm represented the worker as a contractor to its customers. The worker was a doctorate candidate and employed as an adjunct instructor at a local University. Services were performed under the firm's business name; however, the worker's employment with the University was emphasized. The work relationship ended as the demand for the worker's services diminished. The worker was offered another contract with reduced monthly fee, based on reduced tutorial service, but the worker declined citing distance from his primary work. The worker stated the benefit of paid vacations, paid holidays, and personal days were made available to him. The worker did not perform similar services for others. The non-compete agreement prohibited the worker from working with another tutoring service within a 10 mile radius. The worker did not advertise. The worker was fired after a change in management.

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.

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 tutoring services performed by the worker were integral to the firm's business operation. 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.

A person who can realize a profit or suffer a loss as a result of his or her services is generally an independent contractor, while the person who cannot is an employee. "Profit or loss" implies the use of capital by a person in an independent business of his or her own. The risk that a worker will not receive payment for his or her services, however, is common to both independent contractors and employees and, thus, does not constitute a sufficient economic risk to support treatment as an independent contractor. If a worker loses payment from the firm's customer for poor work, the firm shares the risk of such loss. Control of the firm over the worker would be necessary in order to reduce the risk of financial loss to the firm. The opportunity for higher earnings or of gain or loss from a commission arrangement is not considered profit or loss. 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 lump sum/fixed monthly 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.