

SS-8 Determination—Determination for Public Inspection

Occupation

05ITE.89 Instructor/Teacher

Determination:

☒ Employee

☐ Contractor

UILC

Third Party Communication:

☒ None

☐ Yes

Facts of Case

The payer is an elementary school operating an after-school program funded through a county grant. The worker was engaged by the school as a full-time teacher and as a tutor in its after-school program. The school reported the worker's remuneration on Forms W-2 for 2012 through 2015 for her teaching services, and Forms 1099-MISC for 2013 and 2014 for her tutoring services.

Information from the parties supports that the school relied upon the worker's prior training and experience to perform her tutoring services. The school provided the worker with her work assignments and the methods by which to perform them. If problems or complaints occurred, the worker contacted the school for resolution. The worker followed the schedule set by the school. She performed her services on the school's premises. The worker was required to perform her services personally.

The worker did not lease space, or incur expenses in the performance of her services. The school paid the worker at an hourly rate. It covered the worker under workers' compensation. Neither party indicated an investment by the worker in the school or a related business, or the risk of the worker incurring a financial loss beyond the normal loss of compensation.

Both parties reserved the right to terminate the work relationship without incurring a penalty or liability, and in fact, the worker terminated the work relationship.

Analysis

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, the school's 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.

Factors that illustrate whether there was a right to control how a worker performed a task include training and instructions. In this case, the school relied upon the worker's prior training and experience to perform her services. Some employees may work without receiving instructions because they are highly proficient and conscientious workers or because the duties are so simple or familiar to them. Furthermore, the instructions, that show how to reach the desired results, may have been oral and given only once at the beginning of the relationship. The school still retained the right to change the worker's methods and to direct the worker to the extent necessary to protect its financial investment. The worker followed the schedule set by the school and performed her services on the school's premises. 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. The worker was required to perform her services personally, meaning she could not engage and pay others to perform services for the firm on her behalf. 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. These facts show that the school retained behavioral control over the services of the worker.

Factors that illustrate whether there was 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. "Profit or loss" implies the use of capital by a person in an independent business of his or her own. Lack of significant investment by a person in facilities or equipment used in performing services for another indicates dependence on the employer and, accordingly, the existence of an employer-employee relationship. The school paid the worker at an hourly rate. Payment by the hour generally points to an employer-employee relationship. These facts show that the school retained control over the financial aspects of the worker's services.

Factors that illustrate how the parties perceived 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 were part of the service recipient's regular business activities. In this case, the worker performed her services on a continuing basis. She performed her services under the school's name. The worker was not engaged in an independent enterprise, but rather the tutoring and related services performed by the worker were a necessary and integral part of the school's mission of providing an after-school program. 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 business. These facts show that the school retained control over the work relationship and services of the worker.

Based on the above analysis, we conclude that the school 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 for all services, and not an independent contractor operating a trade or business.