

SS-8 Determination—Determination for Public Inspection

Occupation 05ITE.95 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

Facts of Case

The worker submitted a request for a determination of worker status in regard to services performed for the payer from August 2014 to December 2015 as a teacher/facilitator. The work done by the worker included teaching/tutoring kids in an after-school setting to get them interested in technology and on a path toward college. The payer issued the worker Form 1099-MISC for the years in question. The worker filed Form SS-8 as she believes she erroneously received Form 1099-MISC. In prior years the payer engaged the worker as an employee in connection with similar services performed. When Obama care went into effect, the payer classified the worker as an independent contractor. There was no written agreement between the parties.

The payer’s response stated it is an innovative not-for-profit community organization that grows, connects, and inspires the tech talent ecosystem. It engages with business leaders, educators, and governments to provide programs, develop tech skills, and connect people to careers. The worker was hired as an after-school program teacher/mentor to deliver instruction in technology skills to students for a federally funded grant program. The worker had full autonomy in deciding what to teach during the sessions, which included website creation, digital media, using Google tools for school assignments, etc. The worker was an independent contractor because she had the right to control what she would teach in the after-school sessions based on her background and experience and how it would be done. The worker is a full-time teacher employed by the local school district at the school where the after-school program is operated. The worker was originally employed in 2011 as a part-time after-school technology program teacher. The worker did not again perform services until 2014. In 2014 – 2015, support teachers providing services at the school were changed to a stipend basis to align with how the payer paid support teachers at all other grant-funded programs. The Offer Letter outlined the worker would be paid at an hourly rate of pay through a monthly stipend process. Taxes would not be withheld and Form 1099 would be issued. The worker was required to maintain a time sheet, which was due to the payer on the 20th of the month.

The payer stated it did not provide specific training or instruction to the worker. Based on the worker's background and experience she developed and facilitated activities in technology experiences for students. The worker was hired to teach one after-school session per week during the school year, approximately 24 sessions per school year. The worker had full autonomy in determining what she would teach during those sessions. The worker determined the methods by which assignments were performed. The payer’s after-school program coordinator, who has an office at the school, was contacted and responsible for problem resolution. The payer requested from the worker lesson outlines of activities; reports were not required. The worker performed services once per week in the computer lab provided for the after-school program. Meetings were not required. The payer required the worker to personally perform services. The grant program coordinator arranged for substitutes. The payer paid substitutes. The worker stated specific training and/or instruction was verbally provided by her supervisor. The payer required the worker to turn in a lesson plan each semester. The site supervisor provided work assignments. The payer required the worker to briefly meet at the beginning of the school year.

The payer stated it provided all consumable/reusable materials, e.g. tech gadgets, school supplies, etc. The worker did not provide supplies, equipment, or materials. The worker did not lease equipment, space, or a facility. The worker did not incur expenses in the performance of services for the payer. Customers paid the payer. The payer paid the worker an hourly rate of pay; a drawing account for advances was not allowed. The payer did not carry workers’ compensation insurance on the worker. The worker did not incur economic loss or financial risk. The worker did not establish the level of payment for the services provided as services were budgeted in the federal grant funding for the after-school program.

Benefits were not made available to the worker. The work relationship could be terminated by either party without incurring liability or penalty. The worker did not perform similar services for others or advertise. There was no agreement prohibiting competition between the parties. The work relationship ended when the worker was not invited to return for the second semester of 2014 – 2015.

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, the payer's statement that the worker was an independent contractor pursuant to a written 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 payer required the worker to personally perform services. Furthermore, the services performed by the worker were integral to the payer's business operation. The payer provided work assignments by virtue of the clients served, required the worker to report on lesson outlines of activities, and assumed responsibility for problem resolution. These facts evidence the payer retained the right to direct and control the worker to the extent necessary to ensure satisfactory job performance in a manner acceptable to the payer. Based on the worker's education, past work experience, and work ethic the payer may not have needed to frequently exercise its right to direct and control the worker; however, the facts evidence the payer 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 payer 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 payer 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. As acknowledged by the payer, the worker did not incur economic loss or financial risk. 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 payer'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 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 payer 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 payer can obtain additional information related to worker classification online at www.irs.gov; Publication 4341.