

SS-8 Determination—Determination for Public Inspection

Occupation

05ITE.97 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 as a mentor. The work done by the worker included mentoring for the news project sponsored by the firm in an after-school setting with middle school students who were learning how to create a great news story, from the writing to the videotaping, editing and producing. The firm issued the worker Form 1099-MISC for 2014 and 2015. The worker filed Form SS-8 as she believes she erroneously received Form 1099-MISC.

The firm's response stated it is primarily engaged in the production of a news program and other related activities. The work done by the worker included coordinating public school teachers, in another state, who were engaged in classroom and after-school activities. The worker also led individual classroom activities related to the news project. The worker was classified as an independent contractor as she acted independently, fulfilling agreed upon assignments. There was no written contract. The worker's work with the project was contingent upon annual renewal of a project-related grant.

The firm stated it provided the worker specific training and/or instruction at an annual project-related coordination conference and in conversations during additional twice-yearly meetings. The firm provided the worker assignments through conferences and curriculum support activities. The worker determined the methods by which assignments were performed. The firm's executive producer and director of education were contacted and responsible for dealing with complaints and problem resolution. Reports were not required. The firm attached copies of the worker's invoices requesting payment for services perform as an after-school teacher/mentor and a time sheet documenting the hours worked each week. The time sheet was signed by the worker and the site director. The worker led an hour-long after-school program for 10 – 15 students and coordinated activities of other teacher-mentors working on this project. Classrooms were provided at selected schools by the public school district. The firm required the worker to personally perform services. The firm ultimately hired and paid substitutes or helpers.

The firm stated it provided weekly videos, video cameras, editing software, curriculum, and activity guides. The worker did not provide supplies, equipment, or materials. The public school provided laptop computers which were supplied through a related grant from a private foundation. The worker did not lease equipment, space, or a facility. The worker did not incur expenses in the performance of 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 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.

The work relationship could be terminated by either party without incurring liability or penalty. The worker did not perform similar services for others. The worker is a member of a union. The work relationship ended when the project was completed.

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. 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 firm required the worker to personally perform services. Furthermore, the services performed by the worker were integral to the firm's business operation and news program project. The firm provided specific training and/or instruction, required the worker to attend a conference and twice-yearly meetings, and assumed responsibility for problem resolution. 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.

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. As acknowledged by the firm, 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 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.