

SS-8 Determination—Determination for Public Inspection

Occupation

Personal Service Providers

Determination:

☒ Employee☐ Contractor

UILC

Third Party Communication:

☒ None☐ 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 determination in connection with services performed for the firm as an ESL instructor. Services performed included teaching English classes in person, online, and via hybrid following the firm's syllabi. The worker filed Form SS-8 as they believe they were classified as an independent contractor and seeking a worker status determination. The worker believes they were an employee as they received directives from the firm. They worker was required to wear a uniform provided by the firm.

The firm's response stated its business offers tutoring services to children and teaches English to adults as a second language. The worker was engaged as an instructor. Services performed by the worker included preparing their own lessons and teaching materials and managing their assigned students as the worker saw fit. The worker was classified as an independent contractor as the worker had the discretion over the manner and means how the services were to be performed.

The firm stated the worker received orientation for informational purposes which explained student levels and expectations. The firm provided work assignments personally. The worker determined the methods by which those assignments were performed. If problems or complaints arise, the firm would be contacted as well as responsible for resolution. Reports and meetings were not required. Services were performed on both the firm's premises and remotely as scheduled by the firm. The firm required the worker to personally perform services. The worker could hire substitutes or helpers; approval from the firm was required. The firm was responsible for paying substitutes or helpers. The worker stated the firm provided training and instructions regarding the services to be performed. The firm provided work assignments and determined the methods by which those assignment were performed. The worker was required to attend staff meetings. The firm was responsible for the hiring and paying of substitutes or helpers

The firm stated they provided the worker with a whiteboard, laptop, and class guide. The worker provided a laptop, markers, notebooks, and computer software. The worker did not lease space, equipment, or a facility. The worker did not incur any expenses in the performance of the services for the firm. Customers paid the firm. The worker was paid an hourly rate of pay. The worker could not request advance pay. The worker did not take a financial risk and could not suffer a financial loss performing services. The worker set the rate of pay for the services provided. The firm set the rate for products sold. The worker stated the firm provided the syllabi, books, and markers. The worker provided class materials, copies and the required exercises. The firm set the rate of pay for the services provided.

The firm stated there were no benefits made available to the worker. Either party could end the work relationship without penalty. The worker performed similar services for others during the term of the work relationship. The worker did not advertise their services. There were no agreements prohibiting competition. Services were performed under the firm's business name. The firm ended the work relationship.

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 firm's statement that the worker was an independent contractor pursuant to an oral 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 firm required the worker to personally perform services. Furthermore, the services performed by the worker were integral to the firm's business operation. The firm provided work assignments by virtue of clients served and ultimately 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. 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. As acknowledged by the firm, the worker did not take a financial risk and could not suffer a financial loss by performing services. 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 penalty. There is no evidence to suggest the worker performed similar services for others as an independent contractor. 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.