

SS-8 Determination—Determination for Public InspectionOccupation
05PHC AssistantDetermination:
☒ 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 a determination of worker status in regard to services performed for the payer from January 2019 to January 2020 as an assistant and customer service worker. The services performed included responsibility for all office duties such as making and packaging product, shipping, receiving, data entry, inventory management, cleaning, organizing, customer service, communications with current buyers, invoicing, supply ordering, product delivery, newsletter, and order fulfillment. The payer issued the worker Form 1099-MISC for 2019; a copy of the 2020 tax reporting document was not provided for our review. The worker filed Form SS-8 as she believes she received Form 1099-MISC in error.

The payer's response states it runs a small design company and a start-up wellness company. The worker was engaged to help with various tasks when available. Services performed included shipping, pop-up events, production, and simple design work. The worker, an independent business owner, came to the payer looking for work to supplement her income. The payer explained it could not hire her as an employee, which the worker understood from the beginning; however, the payer could use help with various jobs related to two businesses. The worker came in on a part-time basis when she could. Most of her work was shipping orders. The worker set her own hours and schedule, in addition to working for others. There was no signed agreement between the parties.

The payer stated it provided the worker basic instruction to perform basic tasks. The payer provided work assignments to the worker when she came in to work. The worker would help the payer with what she could on that workday. If the worker had a problem, she asked the payer. The worker was not helping customers unless working a pop-up event. Reports and meetings were not required. The worker had no set routine, schedule, or hours. Services were primarily performed at the payer's office. On occasion, the worker helped with pop-up shops. The payer required the worker to personally perform services. Hiring substitutes or helpers was not applicable. The worker stated the payer provided her specific training and instruction. A morning meeting determined the work assignments for the day. The payer determined the methods by which assignments were performed and assumed responsibility for problem resolution. Copies of emails were provided for our review. Her routine varied and hours were flexible. She typically worked 3 or 4 days a week, 6 to 8 hours per day.

The payer stated it provided a computer, shipping materials, pen, and paper. The worker did not lease equipment, space, or a facility. The worker incurred the unreimbursed expense associated with gas. 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 established the level of payment for the services provided. The payer established the level of payment for the products sold. The worker stated the payer provided all, including a business-issued email account. She did not incur expenses in the performance of services for the payer. She did not incur economic loss or financial risk. The payer established the level of payment for the services provided.

The payer stated benefits were not applicable. The work relationship could be terminated by either party without incurring liability or penalty. The worker performed similar services for others; the payer's approval was not required for her to do so. An agreement prohibiting competition between the parties was not applicable. The payer represented the worker as a contractor to its customers. Services were performed for the benefit of the payer's businesses. The worker ended the work relationship. The worker stated the benefit of a cash bonus and tips was made available to her by the payer. She did not perform similar services for others or advertise. The payer required her to sign a non-disclosure agreement. The payer represented her as an assistant and part-time employee to its customers. She ended the work relationship as the payer refused to reclassify her as an employee.

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 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. 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 operations. The payer provided work assignments and ultimately 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. 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 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 businesses. 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 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.