

SS-8 Determination—Determination for Public Inspection

Occupation

06AAS Aides/Assistants

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 a determination of worker status in regard to services performed for the firm from January 2019 to June 2019 as a psychometrist. The firm issued the worker Form 1099-MISC for 2019. The worker filed Form SS-8 as they believe they received Form 1099-MISC in error because the firm received payments and referrals directly, supervised all work done by the worker, and determined the schedule of the worker.

The firm's response states it is an independent psychology practice. The work provided by the worker was psychometrist. The worker was requested to administer psychological tests, score the tests, and provide the results in a report format to the firm. The firm states that it did not determine the worker's schedule as it was based on the worker's availability. The firm provided an independent contractor agreement that was signed by both parties.

The firm states that they did not provide the worker with training or instruction beyond the general guidelines for the report formats. The worker received job assignments from the firm when they provided their availability to the firm, and the firm would assign appointments accordingly. The firm states that the worker would determine the methods by which job assignments were performed. If the worker encountered any complaints or problems during their job duties, they were required to contact the firm's owner psychologist and work together with the owner on a resolution. The worker was required to provide the firm with psychological reports with test findings. The firm states that the worker provided their availability to the firm and determined the days and hours that they wished to work. The firm states that the worker provided services at the firm's premises and could write up the results wherever they chose. The firm states that there were no meetings required of the worker and the worker was required to provide services personally. Helpers or substitutes were not applicable to the work situation. The worker states that the firm owner would instruct the worker on what test to administer to the firm's clients. The worker states that the firm's owner determined the methods by which tasks were performed and assumed responsibility for problem resolution. The worker provided the firm with psychological evaluation reports. The worker would check in upon arriving at the firm's premises, grab testing materials and wait for clients to show up, administer tests and return materials, then work on reports. The worker performed all services at the firm's premises and had to perform services personally. The worker states that if helpers or substitutes were required, the firm owner would hire and pay them.

The firm states that they provided the premises, test materials and test protocols; the worker provided their computer for job tasks. The worker did not have to lease space, facilities, or equipment for their job duties. The firm states that the worker incurred travel and fuel expenses. The firm paid the worker for each completed project with report. The worker was not allowed access to a drawing account for advances. Customers of the firm paid the firm. The firm did not carry worker's compensation insurance on the worker. The firm states that as an independent contractor, it is possible for the worker's expenses to exceed their income. The firm states that payment for services was mutually agreed upon in the contract. The worker states that the firm provided everything, including supplies, materials and equipment. The worker did not lease space, facilities, or equipment. The worker had no expenses beyond transportation to the clinic. The worker was paid on a piece work basis. Customers of the firm paid the firm directly. The worker faced no economic loss or financial risk while performing services. The worker states that they did not establish the level of payment for services rendered.

The firm states that they did not provide the worker with any benefits during the work relationship. The relationship between the parties could be terminated by either party without liability or penalty. The worker was not a member of a union. The firm was unaware if the worker performed similar services for other firms but states that the worker would not require approval to do so. The firm states that they only represented the worker as someone who would be testing the clients of the firm and not as an employee. The firm states that the work relationship ended when the worker stopped asking for assignments. The worker states that there were no benefits offered by the firm and that they did not perform similar services for any other firm. There were no non-compete agreements in place between the parties. The worker did not advertise their services to the public. The worker was required to return the finished product (email of test results with report) to the firm's owner upon completion. The worker states that the firm represented the worker as an assistant to the firm's doctor. The worker voluntarily left the firm, thus ending 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, a statement that a worker is an independent contractor pursuant to a written or 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 firm required the worker to personally perform services. Furthermore, the services performed by the worker were integral to the firm's business operation as a psychological practice. The firm provided work assignments by virtue of the clients needing assessments, required the worker to report on services performed through written reports, 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. By definition, a psychometrist must be supervised by a licensed neuropsychologist. 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, day, 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. Based on the piecework 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 as a psychological practice. 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.