

SS-8 Determination—Determination for Public Inspection

Occupation 06AAS Aides/Assistants	Determination: <input checked="" type="checkbox"/> Employee <input type="checkbox"/> Contractor
UILC	Third Party Communication: <input checked="" type="checkbox"/> None <input type="checkbox"/> 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 December 2019 as a [REDACTED]. 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 payment directly, supervised all work, and managed the worker's schedule.

The firm's response states it is an independent [REDACTED] practice. The work provided by the worker was [REDACTED]. The worker was requested to perform [REDACTED] tests, score the tests, and provide reports to the firm. The firm believes that the worker was an independent contractor because they determined their availability, was not trained, and payment was commensurate on each completed project. The firm provided an independent contractor agreement for our review.

The firm states that the worker did not receive any training or instruction beyond general guidelines on report format. The firm states that the worker would provide their availability and appointments were assigned accordingly. 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 owner and together they would work on problem resolution. The worker was required to provide the firm owner with psychological reports with their test findings. The firm states that the worker determined how much they wanted to work, when they wanted to work, and their availability to the firm. The worker performed testing services at the firm's premises and chose where they wished to write up their reports. The worker did not have to attend any meetings. The worker was required to perform all services personally. Substitutes and helpers were not applicable to the worker situation. The worker states that the firm owner instructed on what type of test to administer to patients. After evaluations were performed, the firm owner would deliver further instruction if additional tests were required. The worker received job assignments from the firm's claimant schedule. The firm owner determined the methods by which job assignments were performed and assumed responsibility for problem resolution. The worker was required to submit a psychological evaluation report on each claimant. The worker's day would begin with checking in with the firm's doctor, grabbing testing materials, performing tests, returning materials, and then working on reports. All services were performed at the firm's premises. There were no meetings required of the worker and the worker was required to perform services personally. Helpers or substitutes would be hired and paid for by the firm's owner.

The firm states that they provided the worker with the premises, test kits, and test protocols. The worker had to provide their computer. The worker did not have to lease space, facilities, or equipment. The worker would incur travel expenses such as fuel and travel time. The firm paid the worker for each completed project (report). The worker did not have access to a drawing account for advances. Clients of the firm would pay the firm directly. The firm did not carry worker's compensation insurance on the worker. The firm states that the worker might have expenses that exceeded their income, thus exposing them to economic loss or financial risk. The worker and the firm mutually agreed upon payment for services rendered per the contract that was established between the parties. The worker states that the firm provided everything needed for their job duties (all supplies, materials, and equipment). The worker's only expense was transportation to the clinic. The worker was paid on a piece work basis. The worker had no exposure to economic loss or financial risk. The worker states that they did not set the level of payment for services rendered.

The firm states that they did not offer the worker any benefits during their work relationship. The relationship between the parties could be terminated by either party without liability or penalty. The firm was unaware if the worker performed similar services for any other firm during the work relationship. The worker would not need approval to do so if they had. The worker was not a member of a union. The firm was unaware of any advertising that the worker may have or may not have done. The worker was required to send a copy of the finished product (the report) to the firm. The firm states that they never represented the worker as an employee to clients but instead just stated that the worker would be doing some testing with them. The firm states that the work relationship ended when the worker stopped asking for job assignments. The worker states that the firm did not offer any benefits and the work relationship could be terminated by either party without liability or penalty. The worker 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 and was not a member of a union. The worker was required to email a copy of their finished report to the firm's doctor. 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 of psychological services. The firm provided work assignments by virtue of the clients served, required the worker to report on services performed through emailed 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 law, psychometrists must perform under the supervision of 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. 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.