

SS-8 Determination—Determination for Public InspectionOccupation
06SCI.1 ScientistDetermination:
☒ 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**

Information provided indicates the firm is a government research and development company. The firm indicated [REDACTED] was working as an independent contractor under a consulting agreement to develop gravitational radiation technology for military application. The agreement was temporary for six months. (reporting documents shows she also performed services continuing into 2014.) The firm stated they did not provide any specific training or instructions. They provided project objectives and [REDACTED] executed the work based on her expertise. The worker attended weekly update meetings were assignments were given. The firm indicated any of the three members of [REDACTED] staff were available to resolve issues. The worker provided PowerPoint slides describing her progress and submitted a quarterly report and a final report. The firm stated she managed her own schedule. Services were to be performed personally. The firm provided the work space, equipment and supplies. The worker was paid by the hour and reimbursed for out of pocket expenses authorized by the firm. The customer paid the firm. Either party could terminate the work relationship without incurring a penalty or liability. The firm provided a copy of the confidentiality and non-solicitation agreement and consulting agreement to include Schedule A. The firm stated the worker performed all work under her own name. The firm indicated the contract ended.

The worker agrees all work was performed on the firm premises, utilizing the firm's equipment, space and supplies. She agreed all work assignments and directions were given via weekly staff meetings, and daily informational meetings. She indicated all work was performed under the direction of the Program Manager and Chief Scientist. She had previously performed the same work, under these same managers in 2012, under the company name [REDACTED] and had been paid as an employee. The worker also provided a copy of the consulting agreement. Additional documentation provided by the worker:

- a copy of the firm's business card which provided her name, telephone, number her company e-mail address.
- a copy of the firm's personnel pages, which was circulated to everyone, which lists her as their physicist & developer.
- Schedule A states: All hours and expenses shall be authorized in advance. Unless otherwise approved by [REDACTED] all work shall be performed at the [REDACTED] principle place of business. It is expected services will be provided in the amount of 40 hours per week, except as otherwise authorized. The worker would be compensated at the rate of \$50.00 an hour. The worker is to submit an invoice and a travel expense report and supporting receipts.
- An e-mail from [REDACTED] to [REDACTED] dated June 2013, which explained the firm did not at the present time have the resources to offer benefits to anyone, employee or otherwise. Also, [REDACTED] would avoid the costs of acquiring worker's compensation insurance and setting up a payroll accounting and administration system, both of which would decrease overall funds available for compensating an employee. They did want to stress she was no less a member of the [REDACTED] team as a 1099. The decision was based purely on the practicalities of the situation.

The question of whether an individual is an independent contractor or an employee is one that is determined through consideration of the facts of a particular case along with the application of law and regulations for worker classification issues, known as "common law." Common law flows chiefly from court decisions and is a major part of the justice system of the United States. Under the common law, the treatment of a worker as an independent contractor or an employee originates from the legal definitions developed in the law and it depends on the payer's right to direct and control the worker in the performance of his or her duties. Section 3121(d)(2) of the Code provides that the term "employee" means any individual defined as an employee by using the usual common law rules.

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. In determining whether an individual is an employee or an independent contractor under the common law, all evidence of both control and lack of control or independence must be considered. We must examine the relationship of the worker and the business. We consider facts that show a right to direct or control how the worker performs the specific tasks for which he or she is hired, who controls the financial aspects of the worker's activities, and how the parties perceive their relationship. The degree of importance of each factor varies depending on the occupation and the context in which the services are performed.

Therefore, your statement that the worker was an independent contractor pursuant to an 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.

Analysis

-A worker who is required to comply with another person's instructions about when, where, and how he or she is to work is ordinarily an employee. This control factor is present if the person or persons for whom the services are performed have the right to require compliance with instructions. Some employees may work without receiving instructions because they are highly proficient and conscientious workers or because the duties are so simple or familiar to them. Furthermore, the instructions, that show how to reach the desired results, may have been oral and given only once at the beginning of the relationship.

-If a worker must perform services in the order or sequence set by the person or persons for whom the services are performed, that factor shows that the worker is not free to follow the worker's own patterns of work. Often, because of the nature of an occupation, the person or persons for whom the services are performed do not set the order of the services or set the order infrequently. However, if the person or persons retain the right to control the order or sequence of the work, this is sufficient to indicate an employer-employee relationship. See Rev. Rul. 56-694, 1956-2 C.B. 694.

-A requirement that the worker submit regular or written reports to the person or persons for whom the services are performed indicates a degree of control. See Rev. Rul. 70-309, 1970-1 C.B. 199, and Rev. Rul. 68-248, 1968-1 C.B. 431.

-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. See Rev. Rul. 74-389, 1974-2 C.B. 330.

-If the person or persons for whom the services are performed ordinarily pay the worker's business and/or traveling expenses, the worker is ordinarily an employee. An employer, to be able to control expenses, generally retains the right to regulate and direct the worker's business activities. See Rev. Rul. 55-144, 1955-1 C.B. 483.

We have applied the above law to the information submitted. As is the case in almost all worker classification cases, some facts point to an employment relationship while other facts indicate independent contractor status. The determination of the worker's status, then, rests on the weight given to the factors, keeping in mind that no one factor rules. The degree of importance of each factor varies depending on the occupation and the circumstances.

Evidence of control generally falls into three categories: behavioral control, financial control, and relationship of the parties, which are collectively referred to as the categories of evidence. In weighing the evidence, careful consideration has been given to the factors outlined below.

Factors that illustrate whether there is a right to control how a worker performs a task include training and instructions. In this case, you retained the right to change the worker's methods and to direct the worker to the extent necessary to protect your financial investment.

Factors that illustrate whether there is a right to direct and control the financial aspects of the worker's activities include significant investment, unreimbursed expenses, the methods of payment, and the opportunity for profit or loss. In this case, the worker did not invest capital or assume business risks, and therefore, did not have the opportunity to realize a profit or incur a loss as a result of the services provided.

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 your business. Both parties retained the right to terminate the work relationship at any time without incurring a liability.

CONCLUSION

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. Documentation provided indicated the firm was fully aware of the concept of employee vs independent contractor. But, in fact in order to avoid paying payroll taxes, setting up administrative or payroll services, until the firm was more volatile, determined to report income paid on a 1099-MISC form. The worker was in fact represented as part of the firm's staff, performed services under the direction and control of the firm. The worker was required to attend daily and weekly staff meetings, was paid by the hour and reimbursed for out of pocket expenses. The worker relationship also continued into tax year 2014. The worker was required to perform services for forty hours per week, indicating full time employment.