

SS-8 Determination—Determination for Public Inspection

Occupation

07GWO.1 Government Worker

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

It is our usual practice in cases of this type to solicit information from both parties involved. Upon the submission of the Form SS-8 from the worker, we requested information from the payer concerning this work relationship. The payer responded to our request for completion of Form SS-8.

From the information provided the payer is a city government and the worker is the current elected city treasurer and has served in this position since 1999. The worker was engaged to work on the Municipal Continuing Disclosure Cooperation Initiative and Formation of Reassessment of a district. The payer believes the worker was an independent contractor while performing services on this project as per their verbal agreement with the worker and the duties were outside the scope of worker's job as City Treasurer. The payer reports the worker's earnings as a city treasurer on Forms W-2. The payer reported the worker's earnings for services on this project on a 1099-MISC.

The payer provided no training or instructions to the worker in regard to her services. The worker received her assignments from the City Council and the City Manager and the municipal code and the City Council determined how the worker performed her services. The worker was required to personally perform her services and she performed her services the majority of the time at the payer's premises. The worker had the ability to perform services out of her home. The worker was required to notify the City Manager and/or City Council if any problems arose for their resolution. The worker was required to attend meetings to discuss reports.

The payer provided the office space, computer, office supplies, and office furniture to the worker in order to perform her services. The worker did not incur expenses and the payer paid the worker upon the completion of the project. The worker states the payer provided her with an auto and cell phone allowance. The worker did not have an opportunity to incur a loss as a result of her services.

The worker was not eligible for employee benefits while performing these services on this project for the payer. The worker did not perform similar services for others and she did not advertise her services.

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.

Integration of the worker's services into the business operations generally shows that the worker is subject to direction and control. When the success or continuation of a business depends to an appreciable degree upon the performance of certain services, the workers who perform those services must necessarily be subject to a certain amount of control by the owner of the business. In this case, the services performed by the worker were integral to the firm's business operation. This fact evidences the firm was interested in the methods used and the work results. Therefore, 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.

A person who can realize a profit or suffer a loss as a result of his or her services is generally an independent contractor, while the person who cannot is an employee. "Profit or loss" implies the use of capital by a person in an independent business of his or her own. The risk that a worker will not receive payment for his or her services, however, is common to both independent contractors and employees and, thus, does not constitute a sufficient economic risk to support treatment as an independent contractor. If a worker loses payment from the firm's customer for poor work, the firm shares the risk of such loss. Control of the firm over the worker would be necessary in order to reduce the risk of financial loss to the firm. The opportunity for higher earnings or of gain or loss from a commission arrangement is not considered profit or loss. 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 incur expenses, economic loss, or financial risk in connection with services performed.

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.