

SS-8 Determination—Determination for Public Inspection

Occupation

08MUS.3 MUSICIAN

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. [REDACTED] responded to our request for completion of Form SS-8.

From the information provided the payer is a church and the worker was engaged as an organist and acting choir director. The worker was required to personally perform his services and he performed his services at the payer's premises. The worker signed an independent contractor agreement with the payer in 2007 stating the payer and the worker were establishing an independent contractor relationship and not an employer-employee relationship. The payer reported the worker's earnings on Forms 1099-MISC.

The payer states they provided no training to the worker and they did not instruct the worker on what his assignments were and how to complete those assignments. The worker was required to notify the payer if any problems or complaints arose for their resolution. The worker was not required to submit reports to the payer and the payer states the worker was not required to attend meetings. The worker hired substitutes or helpers if needed and the payer was responsible for paying these individuals for their services.

The payer provided the organ to the worker in order to perform his services. The worker did not incur expenses, he was paid on a lump sum basis, and the worker did not have an opportunity to incur a loss as a result of his services. The worker was not eligible for employee benefits. Either party could terminate the work relationship at any time without either party incurring a liability.

The worker was a professional concert organist who performed similar services for others

Analysis

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, Section 31.3401(c)-1(c) of the regulations states that generally professionals such as physicians, lawyers, dentists, veterinarians, contractors, subcontractors, public stenographers, auctioneers, and others in an independent business or profession in which they offer their services to the public are not employees. However, if a firm has the right to direct and control a professional, he or she is an employee with respect to the services performed under these circumstances.

Often the skill level or location of work of a highly trained professional makes it difficult or impossible for the firm to directly supervise the services so the control over the worker by the firm is more general. Factors such as integration into the payer's organization, the nature of the relationship and the method of pay, and the authority of the payer to require compliance with its policies are the controlling factors. Yet despite this absence of direct control, it cannot be doubted that many professionals are employees.

The worker was experienced in this line of work and did not require training or detailed instructions from the payer. The need to direct and control a worker and his services should not be confused with the right to direct and control. The worker provided his services on behalf of and under the payer's organization's name and services provided to the public rather than an entity of his own. This gave the payer the right to direct and control the worker and his services in order to ensure that he did not damage the goodwill associated with the payer's name or reputation or anything that would cause the public and its parishioners to lose confidence in the payer's organization.

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 regarding the services he performed for the payer. Both parties retained the right to terminate the work relationship at any time without incurring a liability.

It is acknowledged that the worker was a professional concert organist and he performed similar services for others. While the working for others can be a characteristic of an independent contractor, an individual may perform services that it is possible for a person to work for a number of people or payers concurrently due to financial need and the supporting oneself and be an employee of one or all of whom engages him or her. In this case, when the worker performed services for the payer, his services were that of a choir director and music director and the relationship was continuous rather than a one time transaction taking place.

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, co-adventurer, agent, or independent contractor must be disregarded.

Therefore, the payer's 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.

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.