

SS-8 Determination—Determination for Public Inspection

Occupation

08PEN Performers/Entertainers

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. After the worker's initial filing of the Form SS-8, Determination of Worker Status for Purposes of Federal Employment Taxes and Income Tax Withholding, we requested information from the firm concerning this work relationship. The firm provided information in regard to this work relationship by completing Form SS-8.

From the information provided the firm is an entertainment production provider and the worker was engaged from May 2016 to January 2019 as a department head for the firm's video department and as a field technician. As a department head, the worker was treated as an employee with his earnings reported on Forms W-2. As a field technician the worker was treated as a contractor with his earnings reported on Forms 1099-MISC. This determination will focus on and determine the worker's services as a field technician.

The worker was one of the many field technicians that the firm hired to work for their clients on the job site as a professional operator. The worker's services were performed 100% outside of the firm's facility and were job sites that a client hired multiple parties, companies, vendors, and professionals to support. The firm states they hire professional experienced technicians from all over the United States that fly in to provide their special services for events. The firm states that at any time the worker could choose not to take a position as an operator. The firm states that it had no bearing on any employment status of his W-2 duties and it was not a requirement to maintain his W-2 position. If the worker chose not to work on a job site or event then there would be other freelance technicians contracted for those duties. The clients hire the firm as the general contractor for the event and the firm provided the production packages that their clients required. The clients set the times and locations that the event would take place. The worker arrived and operated the equipment under a schedule determined by the firm's client. The firm states that no one told the worker how to specifically perform his duties and he was expected to take special liberties with operating that equipment so long as it met the client's expectations for delivering the final product. The firm states that most of the professional operators in the entertainment industry work on the standard premise of being a 1099 independent contractor unless they were specifically hired as a full-time employee for that purpose. The firm states that field technicians often bring in a lot of their own tools and equipment to perform their services.

The worker's duties as a field operator included operating on site for clients' events constructing and erecting video structures and operating consoles for meetings and presentations. The worker's instructions in the field were primarily directed by the clients' schedules and performance times. The clients set forth what and how the events would take place and they would hire independent directors that would direct and produce the presentations. The directors do not tell the operators how to operate their equipment but they do expect the operators to have the media ready for presentation and to present a look and timing as indicated by the director. The operators set the equipment in a fashion suitable for themselves and then they run their position parallel with all the other operators on that site. Every operator may determine how they set or operate their location. If complaints or issues arose regarding the worker, the complaints would be directed at the director or the event producers on the site. If an issue arose with equipment that the firm provided for the site, that issue would be directed back to the firm. The firm states that reports were not required from the worker in the field, other than the firm needing to know if the worker experienced any technical issues with the equipment provided. Every site and location are completely different with times and schedules being dictated by the client. The firm states that any times which they gave to the worker to perform his services should never be construed as they dictating the worker's schedule as they were only passing the info that was given from their clients. The worker was compensated on a daily lump sum per project and for the expectation of completion of that project. The firm states they did not track the worker's hours on job sites but the worker could bill them for hours past the expected time of being on site. The firm provided a copy of their pay policies for field technicians for consideration in this case.

The locations where the worker performed his services were set forth by the firm's clients. Typical locations were hotels, ballrooms, convention centers, city facilities, parks, and street events. The average time on site at the firm's clients events was 10 hours daily. Sometimes the firm or the client would hire helpers to assist the worker. The worker was expected to meet a certain look, dress, and punctuality that lended itself to making an event a success. If the worker failed to meet those expectations, the worker could be fired from that duty and not be hired back again.

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, the worker was experienced in this line of work and did not require training or detailed instructions from the firm. 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 the firm rather than an entity of his own. The firm was responsible for the quality of the work performed by the worker and for the satisfaction of their clients. This gave the payer the right to direct and control the worker and his services in order to protect their financial investment, their business reputation, and their relationship with their clients.

The whole relationship needs to be analyzed to determine the worker's correct employment tax status. An important factor of determining a worker's status is who had the contractual relationship with the client and whom did the client pay. In this case, that relationship was between the firm and their clients.

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.

There was no evidence presented or found in this investigation that indicates the worker had an investment in a business related to the services he performed for the firm offering those services to the general public. Lack of significant investment by a person in facilities or equipment used in performing services for another indicates dependence on the employer and, accordingly, the existence of an employer-employee relationship. 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.

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 firm provides production services to its clients handling all aspects of audio, video, lighting, and staging. The worker's services were integral to the operations of the firm's business and the completion of projects they were hired to do. When the success or continuation of a business depends to an appreciable degree upon the performance of certain services, the worker who perform those services must necessarily be subject to a certain amount of control by the owner of the business. The worker's services were not separate and distinct from the services provided by the firm to its clients.

A continuing relationship was established rather than a one-time transaction taking place. A continuing relationship may exist where work is performed in frequently recurring although irregular intervals. The existence of a continuing relationship indicates an employer/employee relationship was established. The firm stated the worker had no obligation to take a job as a field technician and he could accept or reject any job assignment offered to him. However, we believe the worker could not refuse an assignment without jeopardizing his relationship with them or jeopardize the assignment of future jobs.

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

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.