

SS-8 Determination—Determination for Public Inspection

Occupation 08PEN.3 Performer/Entertainer	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 payer from December 2013 to January 2015 as a church pianist. The payer issued the worker Form 1099-MISC for 2014. Copies of the 2013 and 2015 tax reporting documents, if applicable, were not provided. The worker filed Form SS-8 as she believes she erroneously received Form 1099-MISC.

The payer's response stated it is a church. The worker performed piano and church choir services. The amount reported on Form 1099-MISC was incorrect. The worker was an independent contractor as she was on her own and not formally employed. There was no written agreement or job description.

The church board assigned service and practice days and times to the worker. The Board of Directors determined the methods by which assignments were performed. The Board Chairman was contacted and responsible for problem resolution. Reports and meetings were not required. The worker's routine consisted of performing services each week for practice and Sunday service. Sunday service was performed at the church; practice was held at a private residence. The payer required the worker to personally perform services. The payer was responsible for hiring and paying substitutes or helpers.

The payer provided the piano and music books. The worker did not provide supplies, equipment, or materials. The worker did not lease equipment or incur expenses in performing services for the payer. The payer paid the worker a monthly salary; a drawing account for advances was not allowed. The worker did not incur economic loss or financial risk in regard to this work relationship. The payer stated the worker established the level of payment for the services provided. The worker stated the payer established the level of payment.

Benefits were not made available to the worker. The work relationship could be terminated by either party without incurring liability or penalty. The worker did not perform similar services for others or advertise. There was no agreement prohibiting competition between the parties. The work relationship ended when a replacement was assigned by the Board of Directors and music committee.

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.

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 payer required the worker to personally perform services. The payer's board also provided work assignments, determined the methods used, and assumed responsibility for problem resolution. These facts evidence the payer retained the right to direct and control the worker to the extent necessary to ensure satisfactory job performance in a manner acceptable to the payer. Based on the worker's education, past work experience, and work ethic the payer may not have needed to frequently exercise its right to direct and control; however, the facts evidence it retained the right to do so if needed.

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 payer 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 payer 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. Based on the salary rate of pay arrangement and as acknowledged by the payer, the worker did not incur economic loss or financial risk.

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 payer's church worship. 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 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.

The payer can obtain additional information related to worker classification online at www.irs.gov; Publication 4341.