

SS-8 Determination—Determination for Public Inspection

Occupation

08PEN.4 Performer/Entertainer

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

The firm is a symphony orchestra in the business of performing classical music for the citizens of southern New Mexico. The worker provided her services to the firm in 2012 through 2014 as a cellist with services which included; learning the notes, how to play the music, attending the rehearsals, following the conductor's instruction about how the music should sound, and received the Forms 1099-MISC for these services.

The firm provided instruction on how to interpret the music through conducting, during every rehearsal and throughout the concert performances. The firm mailed the worker the sheet music for the upcoming concert. The worker added that she received copies of recorded performances from the firm's orchestral librarian, and the conductor determined the methods on how the music should sound. If problems or complaints arose the worker was required to contact either the firm's manager or conductor and they were responsible for problem resolution. The worker stated that her schedule varied; rehearsals were from approximately 7:30PM to 10:00PM and concerts began at either 3:00PM or 7:30PM. The firm maintains that it was the worker's choice to perform at some of the concerts during the season. She provided her services personally at the firm's recital hall and venues rented by the firm for concerts. If additional help was required, the firm hired and compensated the helpers.

The firm provided all the necessary supplies and equipment the worker needed to provide her services which included; rehearsal/concert venue, music stands, chairs, lighting and sound equipment, copies of recorded performances, and the sheet music. The worker provided her instrument. The worker did not lease any equipment nor were any business expenses incurred other than the cost of her instrument and its maintenance, in the performance of her services. She received a flat fee for her services. The firm's customers paid the firm for the services the worker provided. The firm carried workers' compensation insurance on the worker. The worker did not assume any financial risk in the relationship. The firm established the level of payment for the services the worker provided.

The worker did perform similar services for others during the same time period. The worker provided her services under the firm's business name. There was a dress policy which the worker was to follow. In fact, the worker submitted a copy of the concert dress policy which stated that "The personnel manager may at his discretion, refuse to allow an improperly dressed musician to perform – which would result in loss of pay." Both parties retained the right to terminate the relationship without incurring liability.

Analysis

The application of the three categories of common law evidence to the available facts of the relationship indicates that the firm retained the right to direct and control the worker in the performance of her services. Accordingly, the worker was an employee of the firm for purposes of Federal employment taxes.

Worker status is not something to be selected by either the firm or the worker. Worker status is determined by the examination of the actual working relationship as applied to Internal Revenue Service code.

Hence, to clarify the Federal Government's position on worker status, we will be determining this case based on their common law practices in which the actual relationship between the parties is the controlling factor.

The firm instructed the worker regarding the performance of her services. 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. The firm retained the right, if necessary to protect their business interest, to determine or change the methods used by the worker to perform her assignments. The facts show that the worker was subject to certain restraints and conditions that were indicative of the firm's control over the worker. 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. 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. The worker had a continuous relationship with the firm as opposed to a single transaction. A continuing relationship between the worker and the person or persons for whom the services are performed indicates that an employer-employee relationship exists. A continuing relationship may exist where work is performed in frequently recurring although irregular intervals. The worker rendered her services personally. 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. The worker's services were under the firm's supervision.

The firm provided the worker with the necessary equipment and materials. The fact that the person or persons for whom the services are performed furnish significant tools, materials, and other equipment tends to show the existence of an employer-employee relationship. Her pay was based on a flat fee for her services. The worker could not have incurred a loss in the performance of her services for the firm, and did not have any financial investment in a business related to the services performed.

The worker worked under the firm's name, and her work was integral to the firm's business operation. The above facts do not reflect a business presence for the worker, but rather, strongly reflect the firm's business. If a worker performs more than de minimis services for a multiple of unrelated persons or firms at the same time, that factor generally indicates that the worker is an independent contractor. However, it is possible for a person to work for a number of people or firms concurrently and be an employee of one or all of them. Either the firm or the worker could terminate the agreement.

Based on the common-law principles, the firm had the right to direct and control the worker. The worker shall be found to be an employee for Federal tax purposes.