

SS-8 Determination—Determination for Public Inspection

Occupation

02LAW Law Staff

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 worker submitted a request for a determination of worker status in regard to services performed for the firm from August 2018 to currently as an attorney. The firm issued the worker Form 1099-MISC for 2018 and 2019. The worker filed Form SS-8 as they believe they received Form 1099-MISC in error. The worker provided an essential employee letter from the firm, their job offer letter, and additional info to back up their claim that they are an employee of the firm. The worker states that they were hired as an employee, they were required to perform the same duties as other employees of the firm, they had to answer to the firm's owner for all accounts, and marketing was paid for by the firm's owner. The firm's response states it is a law firm specializing in real estate transactions. The work provided by the worker was as a contract attorney. The worker was requested to develop business and close real estate transactions. The firm did not provide supervision or direction. The firm believes the worker was an independent contractor because they made their own hours, conducted themselves without the firm's guidance, chose their market, and worked however often they wished.

The firm states that initially they had offered the worker training but the worker refused the offer and stated that they were already full trained in the profession of attorney. The firm states that the worker set their own appointments and determined the methods by which job assignments were performed by following standard procedures. If the worker encountered any issues or problems that arose during their job responsibilities, the worker was required to contact the office manager who would determine the appropriate contact for problem resolution. The worker was required to provide to the firm a month end pay report. The firm states that they are unaware of the schedule of the worker since the worker made their own appointments and only entered the office when they felt it was necessary. The firm states that the worker provided services wherever they wanted to do so. The firm states that there were no mandatory meetings for the worker to attend, only occasional optional meetings. The worker was required to perform services personally. If helpers or substitutes were required, the law firm would be responsible for hiring and paying them. The worker states that there was free required training provided by the firm. The worker states that clients would contact the firm's office and from there the firm's office manager would make title orders and instructed the worker to schedule the closings. The worker submitted additional information stating that any communication with clients had to be done through the firm's paralegal team. The worker states that the firm would determine the methods by which job assignments were performed and the firm's owner was responsible for problem resolution. The worker was required to provide a monthly report that would be the basis of their pay by the office manager. The worker would perform marketing to bring in business for the firm in addition to performing real estate closings. The worker states that they were required to attend staff meetings. The worker was required to perform all services personally. If helpers or substitutes were required, they were hired and paid by the firm.

The firm states that they provided the worker with a locked bag for files, business cards, files, promotional items, and errors and omissions insurance. The worker was required to provide a car, gas, phone, bar dues, license to practice law, and notary stamp. The firm states that the worker did not have to lease space, facilities, or equipment. The firm states that the worker pays for half of their marketing expenses, and the firm provides reimbursement for the other half. The worker received pay as commission with no access to a drawing account for advances. The customer would pay the firm for all services rendered. The firm carried worker's compensation insurance on the worker. The worker was not exposed to economic loss or financial risk. The level of payment for services was usually a joint decision. The worker states that all supplies and equipment were provided by the firm, but the worker supplied their own laptop. The worker states that they were charged 50% monthly for their sales by the firm and that they were paid on a piecework basis. The worker states that as an attorney, the client would belong to the attorney but the law firm would control everything. The customer would pay the firm, and the worker states that they would set the level of payment for services rendered. The worker provided additional documentation stating that all payments received from clients would be deposited into the firm's bank account and then the net amount would be paid to the worker.

The firm states that no benefits were provided to the worker. The work relationship between the firm and worker could be terminated at any time without incurring loss or liability. The worker did not perform similar services to any other firm at the time they worked for the firm. The firm states that there were no agreements in place prohibiting competition between the firm and the worker. The worker was not a member of a union. The firm states that they provided the worker with business cards and promotional materials. The firm states that all services performed by the worker were performed under the name of the law firm. The worker, as evidenced on the firm's website, is still performing services for the firm. The worker states that they were provided the benefit of signing as an agent for title insurance. The worker states that if the work relationship ended, they could face the loss of income because of the lack of unemployment insurance. The worker states that they were not allowed to work outside of the law firm. The worker states that they were represented as an employee of the firm under the firm's name. The worker provided their offer of employment letter from the firm, where the firm gave the worker a choice of how they wished to be paid, and how the choice to be an employee would result in the offering of benefits such as insurance. The worker also provided an essential employee letter where the firm states that the worker was an essential employee of the firm.

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.

Therefore, a statement that a worker is an independent contractor pursuant to a written or verbal 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. Furthermore, whether there is an employment relationship is a question of fact and not subject to negotiation between the parties.

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 firm required the worker to personally perform services. Furthermore, the services performed by the worker were integral to the firm's business operation. The firm provided work assignments by virtue of the customers served, required the worker to report on services performed, and assumed responsibility for problem resolution. These facts evidence 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. Based on the worker's education, past work experience, and work ethic the firm may not have needed to frequently exercise its right to direct and control the worker; however, the facts evidence the firm retained the right to do so if needed.

Payment by the hour, day, 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 firm 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 firm 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. 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. The worker did not have any exposure to economic loss or financial risk during their job responsibilities, and all payments received from clients would go through the firm's bank account before the worker was issued any payment for services rendered.

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 worker was represented by the firm under the firm's name on their business cards, website, and also on other marketing materials. The offer of employment letter that the worker was issued upon hire mentioned benefits that would be available if the worker chose to be paid as an employee. 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.

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