

SS-8 Determination—Determination for Public InspectionOccupation
04DIR DirectorsDetermination:
☒ 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. The payer responded to our request for completion of Form SS-8.

From the information provided the payer provides presentations of classical music and educational music programs to their local area. The worker was engaged as an artistic director from July 1, 2016 to June 30, 2018. The payer believes the worker was an independent contractor (IC) during this time period because there was a memorandum of understanding (MOU) beginning July 1, 2016 that changed the worker's duties and his status from employee to contractor. The worker had previously performed services for the payer as an executive director and those services included fundraising, marketing, staff over-site, attending board meetings and coordinating artistic programs. The payer states that in the position of executive director, the worker assumed more duties and responsibilities. As of July 1, 2016, the worker relinquished all but artistic director services. The payer reported the worker's earnings as executive director on Forms W-2 and the payer reported the worker's earnings as an artistic director on Forms 1099-MISC. This determination will focus on and decide the employment tax status of services the worker performed as an artistic director.

The worker received specific duties of his new position as outlined in the MOU. The worker was to determine and execute yearly artistic programs in consultation with the payer's president of the Board of Trustees. The worker was required to notify this president if any problems or complaints that arose and any problems or complaints were resolved by mutual agreement between both parties. The worker was required to submit a report to the payer of the musical artists contracted to perform and to provide the signed contracts by those artists. The payer states they had no control over the worker's schedule as he controlled his own schedule. The worker met with artists upon arriving in town and he hosted concerts at their local performing arts center. The payer states they were responsible for the hiring and paying of substitutes or helpers.

The payer states they had gifted a laptop computer to the worker in his previous position. The worker provided his own cell phone but the payer paid the worker's monthly bill on this phone. The worker incurred expenses for travel and artists' meals which the payer states they reimbursed the worker for. The worker was compensated on a per concert basis, prorated monthly per the MOU. The contract between the payer and the worker established the level of payment for the services provided and it states that the worker would be treated as an independent contractor for services he performed. The worker did not have an investment in a business related to services performed and therefore, he did not have an opportunity to incur a loss as a result of his services.

The worker was not eligible for benefits. The worker did not perform similar services for others and he did not advertise his services. The payer states they represented their worker as their artistic director. Either party could terminate the work relationship at any time without either party incurring a liability. The MOU between the payer and the worker was terminated in 2018.

Analysis

As in this case and 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 firm afforded the worker with a great deal of freedom while performing his services as the majority of his services were performed away from the payer's premises. With more and more workers working out of their home office and this becoming the reoccurring trend in the current workplace, this fact by itself, does not mean that the worker is not an employee. The worker provided his services on behalf of and under the firm's organization name rather than an entity of his own. The payer 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, the reputation of their organization, and their relationship with their clients and the artists they engaged.

The worker did not have a business license or business registration in the state which he performed services and there was no evidence presented or found in this investigation that the worker offered these same services to the public under a business name. While the worker submitted invoices to the firm and the submission of invoices is a characteristic of an independent contractor, the total relationship needs to be analyzed to make an accurate decision of a worker's status. If a worker is required to provide an invoice in order to obtain a job or as a condition of employment, the factor that the worker submitted an invoice to get paid loses weight in determining the worker's status as an independent contractor.

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 any expenses incurred by the firm in the fulfillment of his services were reimbursed by the payer; therefore, the worker did not have the opportunity to realize a profit or incur a loss as a result of the services provided as someone in business can.

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.

If a firm has to make a worker "understand" or "agree to" being an independent contractor (as in a verbal or written agreement or the filing of a Form W-9), then the worker is not an independent contractor. An individual knows they are in business for themselves offering their services to the public and does not need to be made aware of, understand, or agree to be an independent contractor.

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 firm'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.