

SS-8 Determination—Determination for Public Inspection

Occupation 05ITE Music Teacher	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 firm from August 2019 to December 2019 as a violin instructor. The services performed included teaching private and group lessons at the firm's music school. The firm issued the worker Form 1099-MISC for 2019 and 2020. The worker filed Form SS-8 as she believes she received Form 1099-MISC in error.

The firm's response states it is a retail music shop, which also provides private music lessons. The worker provided private musical instrument lessons to students on an as-needed basis. She was listed as an instructor. The worker was classified as an independent contractor as she signed an independent contractor agreement; set her own schedule, policies, and curriculum; provided her own expertise, supplies, and tools; was free to work for others.

The firm stated it did not provide the worker specific training or instruction. The only instruction given to the worker was in regard to student feedback and making sure the customer was happy. The worker provided her schedule to the firm. The firm filled it with students as available. The worker determined the methods by which assignments were performed. If problems or complaints arose, the firm was contacted and assumed responsibility for problem resolution. Reports included the worker providing her schedule of availability to the firm and confirmation of lessons provided. The worker had no regular routine. Once a lesson was scheduled, the worker was in control of the teaching. Services were performed at the firm's premises. The worker was not required to attend meetings. She was asked to be available by phone or email for questions. The firm required the worker to personally perform services. Substitutes or helpers were never discussed. The worker stated the firm provided a tour of its facility and information about its program. The firm instructed her when to arrive for lessons, how to teach specific students, and how to move students quickly through pieces despite their level of playing. The firm scheduled lessons and emailed the schedule to her. The firm provided input into the methods by which assignments were performed. Her routine consisted of showing up on time for scheduled lessons, teaching students, discussing the lesson with the parent if they attended, and leaving after the last lesson.

The firm stated it provided the facility, room, student list, chairs, and a table. The worker provided and incurred the expense associated with instruments, teaching tools, any supplies needed, travel, license or dues, etc. The student generally had their own instrument. Customers paid the firm. The firm paid the worker an hourly rate of pay; a drawing account for advances was not allowed. The firm did not carry workers' compensation insurance on the worker. The worker's economic loss or financial risk related to loss, damage, or maintenance of her instrument, teaching tools, and supplies. Additionally, her income was directly tied to her availability and her ability to keep a student requesting her. The worker was not paid for her outside time creating plans, policies, and prep work. The firm set the rates between the student and the firm. The worker stated the firm also provided music stands, a mirror, and a private locked closet for her personal teaching supplies. She did not incur economic loss or financial risk. The firm established the level of payment for the services provided.

The firm stated benefits were not offered to the worker. The worker was not asked to solicit new customers. The work relationship could be terminated by either party without incurring liability or penalty. The worker was encouraged to obtain work from other schools and the firm even provided references. It is unknown if the worker was hired by others. If the worker performed similar services for others, the firm's approval was not required for her to do so. It is unknown if the worker advertised. Copies of emails provided by the firm document it was preparing advertising pamphlets. The worker came to the firm through a referral and her experience as a teacher; therefore, the firm represented the worker as an experienced instructor to its customers. The work relationship ended when the worker requested a guaranteed salary and the firm declined. The worker stated new student inquiries were referred to the firm, who handled all emails, phone calls, and spoke with parents who stopped into the retail store to inquire about lessons. She did not perform similar services for others. She was represented as an employee to the firm's customers. The work relationship ended when the firm refused to honor the agreement about the number of hours. She was advised to seek other work.

The independent contractor agreement states, in part, the worker would report directly to the firm's president and to any other party designated by the firm. The worker would fulfill all music teacher duties and would fulfill any other duties reasonably requested by the firm and agreed to by the worker. The firm would pay the worker an hourly rate of pay based on the type of instruction provided, i.e. private lesson, small group class, or group classes. The contract would remain in effect indefinitely so long as it was not terminated by the firm or the worker. The firm could terminate the agreement at any time if the worker failed or refused to comply with its written policies or reasonable directive. The worker was required to provide written notice to the firm in order to terminate the agreement. The worker would devote as much of her productive time, energy, and abilities to the performance of her duties as was necessary to perform the required duties in a timely and productive manner. The worker could perform

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, the firm's statement that the worker was an independent contractor pursuant to a written 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 as related to music instruction. The firm provided work assignments by virtue of the customers served, required the worker to adhere to its written policies and directives, 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, 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. Based on the hourly rate of pay arrangement the worker could not realize a profit or incur a loss.

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. The firm provided 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 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.