

SS-8 Determination—Determination for Public Inspection

Occupation

02OFF.124 Administrative Assistant

Determination:

☒ Employee

☐ Contractor

UILC

Third Party Communication:

☒ None

☐ Yes

Facts of Case

The worker submitted a request for a determination of worker status in regard to services performed for the firm from August [REDACTED] to December [REDACTED] as a marketing assistant. The work done by the worker included administrative tasks such as data entry, preparing and shipping packages, inventory, picking up and dropping off mail, formatting newsletters, answering phones, etc. The firm issued the worker Form 1099-MISC for the year in question. The worker filed Form SS-8 as she believes she erroneously received Form 1099-MISC.

The firm's response stated its business provides continuing education to fitness professionals and sells fitness products online. The worker performed project based marketing and writing services. The firm classified the worker as an independent contract as it was project based work over a specific time period. There was no written agreement between the parties.

The firm stated it provided the worker training related to how to use its marketing software. The firm provided work assignments to the worker. The worker determined the methods by which assignments were performed. The firm was contacted if problems or complaints arose. The firm was responsible for resolution. Reports and meetings were not required. The worker had no set daily routine as she set the days and hours worked. Services were primarily performed at the firm's office and occasionally at the worker's home. The firm required the worker to personally perform services. Substitutes or helpers were not necessary. The worker stated the firm also provided instruction related to filing, shipping practices, and how to speak with customers over the phone. The firm's office manager or CEO determined the methods by which assignments were performed. The worker's routine was Monday through Friday from 11 am to 3 pm. At one point the worker asked to have her work hours changed and she was denied. Services were only performed at the firm's premises.

The firm stated it provided the office computer. The worker did not provide supplies, equipment, or materials. The worker did not lease equipment, space, or a facility. The worker did not incur expenses in the performance of services for the firm. 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 did not incur economic loss or financial risk. The firm established the level of payment for the services provided. The worker stated the firm also provided a printer, shipping supplies, and office supplies.

Benefits were not made available to the worker. The work relationship could be terminated by either party without incurring liability or penalty. The firm stated 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. The work relationship ended when the term of the project ended. The worker stated she did not perform similar services for others or advertise. The firm represented her as an employee to its customers. The worker was fired.

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 firm required the worker to personally perform services. Furthermore, the firm provided on-the-job training, work assignments, 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. Based on the hourly rate of pay arrangement and as acknowledged by the firm, 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 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 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.