

SS-8 Determination—Determination for Public Inspection

Occupation 01FMW Forest Maintenance Workers	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 payer from April 2017 to January 2018 as a laborer. The work done by the worker included cutting trees and working on equipment. The payer issued the worker Form 1099-MISC for 2017. A copy of the 2018 tax reporting document was not provided for our review. The worker filed Form SS-8 as he believes he erroneously received Form 1099-MISC. The payer also filed Form 1040-ES in his name without his consent.

The payer's response states its business is tree services. The worker was engaged as a helper. The work done by the worker included assisting the owner by gathering tree lines, use of chipper, roping, etc. The worker was classified as an independent contractor as his services were utilized on a part-time basis. If he wanted to work, he showed up. The worker did not perform similar services for others. The payer represented the worker as an employee to its customers. There was no written agreement between the parties.

The payer stated the worker had previous experience; therefore, the payer instructed the worker in the safety of using the chipper and chainsaw. The payer determined the methods by which assignments were performed and assumed responsibility for problem resolution. Reports and meetings were not required. The worker's routine varied based on whether he worked or not. Services were performed at various job sites. The payer required the worker to personally perform services. The payer was responsible for hiring and paying substitutes or helpers. The worker stated the payer provided work assignments. Services were also performed at the payer's shop.

The payer stated it provided chaps, gloves, hard hat, safety glasses, and ear plugs. The worker provided clothes and boots. The worker did not lease equipment, space, or a facility. The worker did not incur expenses in the performance of services for the payer. Customers paid the payer. The payer paid the worker a daily rate of pay; a drawing account for advances was not allowed. The payer did not carry workers' compensation insurance on the worker. The worker incurring economic loss or financial risk was not applicable. The worker did not establish the level of payment for the services provided. The worker stated the payer provided all equipment used on the job. The payer paid him an hourly rate of pay. The payer established the level of payment for the services provided.

The benefit of bonuses was made available to the worker. The work relationship could be terminated by either party without liability or penalty. The payer state it is unknown if the worker performed similar services for others. There was no agreement prohibiting competition between the parties. The worker did not advertise. The payer represented the worker as a helper to its customers. The work relationship ended when the worker gave a one-day notice and quit. The worker stated he did not perform similar services for others. The payer represented him as an employee to its customers.

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 payer required the worker to personally perform services. Furthermore, the services performed by the worker were integral to the payer's business operation. The payer provided work instruction, determined the methods used, and assumed responsibility for problem resolution. These facts evidence the payer retained the right to direct and control the worker to the extent necessary to ensure satisfactory job performance in a manner acceptable to the payer. Based on the worker's past work experience and work ethic the payer may not have needed to frequently exercise its right to direct and control the worker; however, the facts evidence the payer 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 payer 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 payer 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. As acknowledged by the payer, the worker did not incur economic loss or financial risk. Based on the daily 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 payer'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 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.

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