

SS-8 Determination—Determination for Public Inspection

Occupation

01PLW Plant & Land Maintenance Workers

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 payer from October 2016 to February 2018 as a brush dragger. The work done by the worker included cutting and picking up brush. The payer issued the worker Form 1099-MISC for 2016 and 2017. The worker filed Form SS-8 as he believes he erroneously received Form 1099-MISC.

The payer's response states its business is tree trimming. The worker was engaged to perform tree trimming services. The payer explained to the worker that a Form 1099 would be issued. The worker worked his own schedule and set his own hours when not working his full-time job. The worker would meet the payer on jobs.

The payer stated it did not provide specific training or instruction to the worker. The worker called the payer for work assignment locations. The payer determined the methods by which assignments were performed and assumed responsibility for problem or complaint resolution. Reports and meetings were not required. The worker's daily routine consisted of trimming and cutting trees. The worker would meet at the payer's shop or job site location. 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 specific instruction about the time to show up for work, what services to perform, etc. and it provided work assignments. If asked by the payer, he would provide a verbal report related to services performed. His daily routine consisted of 8 – 9 ½ hours per day, Monday through Friday, if not canceled for inclement weather or the payer being out of town. Services were primarily performed at customer locations and occasionally at the payer's property. Meetings were held during regular work hours and at the Christmas party.

The payer stated it provided the truck on site. The worker was not required to 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 payer. Customers paid the payer. The payer paid the worker a fixed 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 did not incur economic loss or financial risk. The payer established the level of payment for the services provided.

The payer stated benefits were not made available to the worker. The work relationship could be terminated by either party without liability or penalty. The worker did perform similar services for others during the time in question. The payer's approval was required for the worker to do so. The worker did not advertise. The payer did not represent the worker to its customers. The worker quit. The worker stated the payer provided him the benefit of bonuses, i.e. extra pay for a particularly heavy day. He did not perform similar services for others. There was no agreement prohibiting competition between the parties. He verbally advertised the payer's business. The payer represented him as a member of its crew to its customers. He told customers he worked for the payer. He quit after seeing his taxes.

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 payer's statement that the worker was an independent contractor pursuant to a 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.

A worker who is required to comply with another person's instructions about when, where, and how he or she is to work is ordinarily an employee. This control factor is present if the person or persons for whom the services are performed have the right to require compliance with instructions. Some employees may work without receiving instructions because they are highly proficient and conscientious workers or because the duties are so simple or familiar to them. Furthermore, the instructions, that show how to reach the desired results, may have been oral and given only once at the beginning of the relationship. In this case, the payer provided work assignments by virtue of the customers served, determined the methods by which assignments were performed, 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.