

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 firm is in the business of providing landscaping and irrigation services. The worker was engaged to perform his services as a laborer. He received a 2017 Form 1099-MISC for his services. There was no written agreement.

According to the worker, the firm trained the worker on equipment used to install irrigation systems, build fences, perform other odd jobs, and to direct traffic; however, the firm noted that there was no specific training and no direction from the firm except to complete the work in a timely manner. The worker received his job assignments by reporting to the firm's supervisor who took him to the job site and told the worker what to do and how to do it. The firm noted that it gave the project specs and requirements to the worker and routinely checked to see if it met their customer's order. Each party noted that the other determined the methods by which the assignments were performed but agreed that the firm would be contacted if any issues or problems arose. There were no required reports. The worker reported to work at a set time and worked until told to stop for the day; the firm noted that once assigned a job, he worked until the job was completed. The worker performed his services at job sites designated by the firm. The worker was to provide the services personally with only the firm hiring and paying any substitutes; the firm disagreed and noted that the worker could hire and pay others though that did not apparently happen.

According to the worker, the firm provided safety glasses, work gloves and a hardhat; the firm noted only materials. The worker provided a tape measure, work gloves and computer pencil. The worker drove his own vehicle to the job site and was not reimbursed for gas. Both parties agreed that the worker was paid by the hour each week. The customer paid the firm. The firm established the level of payment for services. The firm carried workers' compensation insurance on the worker.

Both the firm and the worker agreed that there were no benefits. Either party could terminate the relationship without incurring a liability; though the firm disagreed and noted that they could take legal actions for intentional damages caused by the worker. The worker did not perform similar services for others during the same time period; the firm indicated that he did. The relationship has ended.

Analysis

In determining whether an individual is an employee or an independent contractor under the common law, all evidence of both control and lack of control or independence must be considered. The relationship of the worker and the business must be examined. Facts that show a right to direct or control how the worker performs the specific tasks for which he or she is hired, who controls the financial aspects of the worker's activities, and how the parties perceive their relationship should be considered. 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.

Factors that illustrate whether there is a right to control how a worker performs a task include training and instructions. In this case, the firm retained the right to change the worker's methods and to direct the worker to the extent necessary to protect its financial investment. The firm provided landscaping, irrigation and other services; it was the firm that obtained the customers' jobs. The worker was engaged to provide labor needed for the firm's operations. He was assigned to a project/job by the firm who also provided supervision of the work in order to meet their customer requirements. It is reasonable to assume that the worker was provided with at least initial instructions on what was to be done. 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. The worker worked when needed. If the nature of the occupation makes fixed hours impractical, a requirement that workers be on the job at certain times is an element of control. The worker's services for the firm were all performed at the firm's job sites, also a factor that suggests the firm's ability to retain control over the worker. While the worker's services were for a limited time period, those services were continuous and not just a one-time event. A continuing relationship between the worker and the person or persons for whom the services are performed indicates that an employer-employee relationship exists. A continuing relationship may exist where work is performed in frequently recurring although irregular intervals.

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 therefore, did not have the opportunity to realize a profit or incur a loss as a result of the services provided as he had no significant investment. He simply received an hourly rate of pay and was paid each week for his services. 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.

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. There were no benefits and there was no written agreement. The worker was engaged to provide labor for the firm's landscaping operation. When doing so, the worker was not engaged in a separate business venture. Integration of the worker's services into the business operations generally shows that the worker is subject to direction and control. When the success or continuation of a business depends to an appreciable degree upon the performance of certain services, the workers who perform those services must necessarily be subject to a certain amount of control by the owner of the business.

Based on the above analysis, we conclude that the firm had the right to exercise direction and control over the worker for the entire work relationship to the degree necessary to establish that the worker was a common law employee and not an independent contractor operating a trade or business.

Please see Publication 4341 for guidance and instructions for firm compliance.