

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 firm from 2008 to 2018 as a maintenance supervisor. The work done by the worker included, but was not limited to, landscape services, snow removal, building and pool maintenance, parking lot and car port repairs, trash and recycling, building and parking lot light maintenance, critter control, boiler, plumbing, and electrical services, phone calls, etc. The firm issued the worker Form 1099-MISC, under his Social Security Number, for the years in question. The worker filed Form SS-8 as he believes he erroneously received Form 1099-MISC for the regular, recurring services performed. The worker does not dispute the Forms 1099-MISC issued under his business tax identification number received in connection with bid jobs awarded and performed.

The firm's response states it is a home owner's association. It is responsible for obtaining monthly dues from residents, and in return, maintains the common areas and common utilities, i.e. landscaping, appliance maintenance, etc. The worker's business began submitting bids for various projects in 2008 and worked on the bids awarded until January 2018. Projects varied in nature. Some included day-to-day maintenance of the facility, i.e. taking care of the garbage, cutting grass, etc., which were paid on a time-and-materials basis. Others were one-time projects that were paid a flat fee once the work was completed, i.e. cleaning gutters, trimming bushes, etc. The worker was classified as an independent contractor as he has his own company, which billed for services performed, and he worked for other properties.

The firm stated the worker was contracted on the basis that he possessed all the requisite skills to complete the projects for which he was bidding and he could complete a project in a timely manner. The firm did not instruct the worker for how, where, and when to complete his work. It was requested the worker complete routine work in the morning. The worker completed most projects personally, based on his available schedule. The worker also bid on other services that were not initially part of his contract with the firm. The worker also freely marketed to the firm's residents for various handy man services. The worker used some of his own tools during the contract period to complete the work orders. The firm was not privy to the worker's tools. The parties had an agreement where the worker utilized the firm's storage shed for his own tools, separate from any tools owned by the firm.

The firm stated it did not provide specific training or instruction to the worker. The worker bid for non-daily projects. The worker contracted for certain tasks as the firm's needs arose. The worker determined the methods by which assignments were performed. If problems or complaints arose, the worker would complete the work as needed. He would call an outside contractor if required. Worst case scenario, he would call the firm. Reports were not required other than substantiation for time keeping for time-and-materials contracts. The worker's routine was determined based on the contracts and his schedule. Services were performed at the firm's one location. The firm requested the worker attend a monthly board meeting. There was no penalty if he was unable to attend. The firm did not require the worker to personally perform services. The worker's business was required to complete contracts. For flat rate contracts, the worker was responsible for paying substitutes or helpers. If a time-and-materials contract, the firm's approval was required to hire substitutes or helpers. The worker stated the firm instructed when tasks needed to be completed, dictated if tasks would be subcontracted, required him to be on site if subcontractors were performing services, instructed him to research materials, pricing, and availability, etc. Work assignments consisted of daily tasks, verbal requests made by co-owners, work orders for repair/maintenance which were faxed or emailed to him by the firm's management company, and tasks assigned by the board during its monthly meeting. The firm's board of directors determined the methods by which assignments were performed and assumed responsibility for problem resolution. Reports included weekly time sheets, which documented the hours worked and services performed, salt/snow log, maintenance log for walk-up requests made by co-owners, and verbal updates provided at board meetings. Copies of the board's meeting minutes were provided to substantiate these statements.

The firm stated it provided materials and tools. The worker also provided tools. The worker did not lease equipment, space, or a facility. The firm reimbursed the worker for materials for time-and-materials contracts. Customers paid the firm. The firm paid the worker flat rate or time-and-materials, depending on the contract. The firm did not carry workers' compensation insurance on the worker. The worker's economic loss or financial risk related to his tools. The worker established the level of payment for the services provided. The worker stated he did not provide supplies, equipment, or materials for regular, recurring services performed. He did not incur expenses. The firm paid him an hourly rate of pay. He did not incur economic loss or financial risk. The firm established the level of payment for the services provided.

The firm stated the work relationship could be terminated by either party without incurring liability or penalty. The worker did perform similar services for others; the firm's approval was not required for him to do so. The worker would bid for work that he could complete, in addition to the work that he was contracted to perform. The firm represented the worker as a contractor 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.

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. The firm's Articles of Incorporation state, in part, it is formed to manage and administer the affairs of and to maintain its condominium. In doing so, it can contract for and employ persons, firms, or corporations to assist in management, operation, maintenance, and administration of the condominium. Based on these facts, the regular, recurring maintenance services performed by the worker were integral to the firm's business operation. The firm provided work assignments, required the worker to report on services performed, and ultimately 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 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 when paid an hourly rate of pay for regular, recurring services performed, 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.