

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. The work done by the worker includes mowing grass, trimming bushes, planting flowers, and repairing sprinklers. The payer has issued the worker Form 1099-MISC for 2013 through 2018. The worker filed Form SS-8 as he believes he erroneously receives Form 1099-MISC.

The payer's response states it is a landscaping business. The worker is engaged to provide landscape maintenance and sprinkler repair services. The worker is classified as an independent contractor as he makes his own schedule, provides small tools, and works directly for customers. The parties have a verbal agreement. There is no written agreement.

The payer stated it, and on occasion customers, provides the worker specific instruction. Landscape services are performed on a weekly basis as set by the customers' needs. The payer and worker jointly determine the methods by which assignments are performed. The worker can resolve most complaints on his own. If needed, he contacts the payer. There are no written reports, only verbal reports. The worker's daily routine consists of 7 am to 3:30 pm, with a half-hour lunch break. The worker trims, mows, weeds, and does regular yard maintenance for several customers depending on the day. Services are performed at the customers' home. Meetings are not required. The payer requires the worker to personally perform services. Substitutes or helpers are not needed. The worker stated the payer determines the methods by which assignments are performed and assumes responsibility for problem resolution. He performs services six days per week. The payer is responsible for hiring and paying substitutes or helpers.

The payer stated it provides large equipment. The worker provides and incurs the unreimbursed expense associated with his truck, small hand tools, and cell phone. The worker does not lease equipment, space, or a facility. Customers pay the payer. The payer pays the worker a weekly rate of pay; a drawing account for advances is not allowed. The payer does not carry workers' compensation insurance on the worker. The worker does not incur economic loss or financial risk as the customer or the payer will pay for any damages. The worker does not establish the level of payment for the services provided. The worker stated the payer provides supplies, equipment, and materials, in addition to leasing equipment. He provides labor. He does not incur expenses as all are paid for by the payer.

The payer stated benefits are not available to the worker. The relationship can be terminated by either party without incurring liability or penalty. The worker does not perform similar services for others or advertise. There is no agreement prohibiting competition between the parties. Services are performed under the payer's name. The work relationship ending is not applicable. The worker stated the benefit of sick pay is made available to him.

The payer stated the worker is not responsible for soliciting new 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 requires the worker to personally perform services. Furthermore, the services performed by the worker are integral to the payer's business operation. The payer provides work assignments, in addition to ultimately determining the methods by which assignments are performed and assuming responsibility for problem resolution. These facts evidence the payer retains 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 need to frequently exercise its right to direct and control the worker; however, the facts evidence the payer retains 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 has not invested capital or assumed 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 does not incur economic loss or financial risk. Based on the weekly rate of pay arrangement the worker cannot 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 is not engaged in an independent enterprise, but rather the services performed by the worker are a necessary and integral part of the payer's business. Both parties retain the right to terminate the work relationship at any time without incurring a liability. There is no evidence to suggest the worker performs similar services for others as an independent contractor or advertises business services to the general public. 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 has the right to exercise direction and control over the worker to the degree necessary to establish that the worker is 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.