

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 in 2017 and 2018 as a landscape laborer. The firm issued the worker Form 1099-MISC for 2017 and 2018. The worker filed Form SS-8 as he believes he received Form 1099-MISC in error.

The firm's response states it is a seasonal landscape business. The worker was engaged as a subcontractor. The services performed included mulching and planting beds; cutting brush, branches, trees, etc.; other small projects that were part of a larger project in which the firm's owner didn't have time to do. The worker was classified as an independent contractor as he had no set schedule as different job sites were open from 7 am to 7 pm; he could come and go as he pleased; he drove his personal vehicle to job sites and used his own tools. The firm and worker agreed either party could terminate the work relationship at any time. The worker had to use his own vehicle and tools, in addition to having his own insurance. The work schedule was not defined; however, job completion dates were set by the firm.

The firm stated it did not provide the worker specific training or instruction as he had prior work experience. When the worker arrived at the job site, the firm showed him projects that needed completion. The worker determined the methods by which assignments were performed. If problems or complaints arose, the worker was required to contact the firm. The worker was responsible for resolution. Reports were not required as the firm inspected the job after completion to ensure quality for the customer. The worker had no set schedule, only a project deadline. Services were performed at various job sites. The worker could refuse any job. Meetings were not required. The firm required the worker to personally perform services. The firm was responsible for hiring and paying substitutes or helpers to know who was on its job site. The worker stated the firm provided him specific instruction related to the job location, what work to do, when to do it, and how to do it. The firm determined the methods by which assignments were performed and assumed responsibility for problem resolution. His schedule varied and was based on start and stop times determined by the firm.

The firm stated it provided large scale equipment such as a tractor, dump truck, compactors, etc. Materials were delivered by another party to job sites. The worker provided and incurred the unreimbursed expense associated with his vehicle, hand tools, chain saw, safety glasses, work clothes and boots, gloves, masks, etc. The worker did not lease equipment, space, or a facility. Customers paid the firm. The firm paid the worker an hourly rate of pay; a drawing account for advances was not allowed. The firm did not carry workers' compensation insurance on the worker. The worker's economic loss or financial risk was associated with damage or loss to the items he provided. The worker established the level of payment for the services provided. The worker stated the firm provided all tools, materials, supplies, and equipment. He provided transportation to and from work and the occasional use of his chain saw. The firm reimbursed him for the occasional use of his chainsaw for gas and chain use. He did not incur economic loss or financial risk. He did not establish 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 performed similar services for others; the firm's approval was not required for him to do so. There was no agreement prohibiting competition between the parties. The worker did not advertise. The firm represented the worker as a contractor/subcontractor to its customers. Services were performed under the firm's business name. The firm terminated the work relationship. The worker stated benefits were not made available to him. He did not perform similar services for others during the periods in question. The firm 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 firm required the worker to personally perform services. Furthermore, the services performed by the worker were integral to the firm's business operation. The firm provided work assignments by virtue of the customers served, required the worker to contact it if problems or complaints arose, 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. 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 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, 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.