

SS-8 Determination—Determination for Public InspectionOccupation
02BTR Trader

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 November 2018 to September 2019 as a bidder-buyer/operator. The firm issued the worker Form 1099-MISC for 2019. The worker filed Form SS-8 as they believe they received Form 1099-MISC in error because the firm determined the worker's job assignments, how they were performed, and the worker's schedule. There was no written agreement between the parties. The worker provided a determination by the [REDACTED] workforce commission for supporting documentation showing how they were found to be an employee of the firm.

The firm's response states it procures inventory for auto recyclers. The work provided by the worker was providing the firm with estimates of parts on wrecked vehicles. The worker was requested to use the firm's portal to perform data entry notes about these parts. The firm states that it did not provide supervision or direction. The firm attached documentation showing the spreadsheets the worker was required to provide to the firm regarding their transactions and piece work pay owed.

The firm states that they did not provide the worker with any training or instruction as the worker had specialized expertise in the industry. The worker would choose from assignments posted online by the firm and choose to accept or reject tasks that were offered. The worker was required to contact the firm's management if they encountered problems or complaints while working. The worker was required to provide the firm with excel reports showing transactions they performed for the firm. The firm states that the worker's schedule was their own discretion. The firm was unaware of any location beyond the worker's home where tasks were performed. The worker's performance was reviewed weekly with no reward or penalty assessed. The firm states that the worker did not have to perform services personally. The firm states that if helpers or substitutes were required, they were hired and paid at the discretion of the worker. The worker states that they were trained by the firm's manager on how to use their software and evaluate vehicles. Their work assignments were given to the worker by the manager, and auctions were directly assigned to the worker every week. The worker states that the firm owner and manager worked together to determine how job assignments should be performed. The manager of the firm would assume responsibility for problem resolution. The worker was required to log problems they would encounter and provide them to the firm using spreadsheets. The worker performed all services at their home using a computer and all work had to be done within a specified time frame. The worker had to attend weekly mandatory teleconferences. One time the worker asked to opt out of the meetings and was nearly terminated. The worker had to provide services personally and the worker states that they were not allowed to outsource their services.

The firm states that the worker provided everything they needed for their job and the worker did not have to lease space, facilities, or equipment. The firm does not know if any expenses were incurred by the worker. The worker was paid on a piece work basis with no access to a drawing account. The firm did not carry worker's compensation insurance on the worker. The worker would face the loss of their salary if they did not perform their job. The firm states that the firm set the level of payment for all services rendered by the worker. The worker states that the firm provided the online remote desktop and portal for the job duties. The worker was required to provide their computer equipment and software. The only expense the worker incurred was the software subscription that was mandatory for them to do their job. The worker was offered a set amount per vehicle obtained for the firm. Customers of the firm would pay the firm directly. The worker's only exposure to financial risk would be wear and tear on their computer equipment and the subscription to the software. The worker states that the firm predetermined all rates of pay for services rendered.

The firm states that there were no benefits offered to the worker. The relationship between the parties could be terminated by either party without liability or penalty. The firm states that there were no non-compete agreements in place. The firm states that they were dissatisfied with the worker's bills and therefore thus ended the work relationship. The worker states that they did not provide similar services to any other firm while working for the firm. The worker states that they signed a non-disclosure agreement with the firm and were asked not to work for any other firm. The worker was not a member of a union and did not advertise services to the public. The worker states that they were presented as representatives of the firm. The worker states that they were fired when the firm's owner was unhappy with the worker's production.

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 of auto salvage procurement. The firm provided work assignments by virtue of the customers served, required the worker to report on services performed through spreadsheets, and 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, 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 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 piecework 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.