

SS-8 Determination—Determination for Public Inspection

Occupation 02OFF Office Workers	Determination: <input checked="" type="checkbox"/> Employee <input type="checkbox"/> Contractor
UILC	Third Party Communication: <input checked="" type="checkbox"/> None <input type="checkbox"/> 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 December 2016 to June 2017. The work done by the worker included handling email orders, receiving parts through mail services, checking in items, preparing weekly shipments, and shipping out orders via the freight forwarder. The firm issued the worker Form 1099-MISC for 2017. A copy of the 2016 tax reporting was not provided for our review. The worker filed Form SS-8 as he believes he erroneously received Form 1099-MISC.

The firm's response states its business is the packing of auto parts to be exported. The worker performed services from January 2017 through June 2017. The work done by the worker included packing auto parts on skids to be shipped. The worker was classified as an independent contractor as he worked his own hours, never received benefits, and could come and go as he pleased. The parties agreed the worker was responsible for paying his own taxes.

The firm stated it did not provide specific training or instruction to the worker. The worker was told what to do; however, not told how it was to be done. Work assignments were generated based on parts delivered and then repackaged. The firm and worker determined the methods by which assignments were performed and discussed resolution to problems or complaints. Reports were not required. The worker did not have scheduled hours. Parts were shipped from a neutral location. As agreed, the firm had no authority to suspend, discipline, or dismiss the worker. The firm did not require the worker to personally perform services. The worker delegated work to others. He hired and paid his brother and friends to help him. The worker stated the firm instructed him on how to handle orders, check in parts, and pack items for shipment. Works assignments were based on email orders and telephone requests from the firm. The firm determined the methods by which assignments were performed and assumed responsibility for problem resolution. He reported to the firm daily on orders and anything having to do with the warehouse. He performed services on a regular, recurring basis, typically 9 am to 5 pm, Monday through Friday. Telephone calls served as meetings for special requests or to answer questions. The firm required him to personally perform services. The firm ultimately hired and paid substitutes or helpers.

The firm stated it provided tape and all packing materials. The worker sorted and packed. The worker did not lease equipment, space, or a facility. If agreed, the firm reimbursed the worker for supplies and materials needed to complete the work. The worker paid his own expenses. Customers paid the firm. The firm paid the worker monthly, as agreed. A drawing account for advances was not allowed. The firm did not carry workers' compensation insurance on the worker. The worker had no economic loss or financial risk. The worker did not establish the level of payment for the services provided. The worker stated the firm provided all equipment needed to do the daily job. He did not incur expenses in the performance of services for the firm. The firm paid him a fixed monthly rate of pay. The firm established the level of payment for the services provided.

The firm stated benefits were not provided. The work relationship could be terminated by either party without incurring liability or penalty. The worker did not perform similar services for others or advertise. There was no agreement prohibiting competition between the parties. The firm represented the worker as a subcontractor to its customers. The work relationship ended when the worker tried to steal the firm's business. The worker stated the firm provided the benefit of travel to its out-of-state office. The firm represented him as an employee to its customers. Services were performed under the firm's business name. The work relationship ended through a text message.

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, the firm's statement that the worker was an independent contractor pursuant to a 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. In this case, the services performed by the worker were integral to the firm's business operation. The firm provided work assignments and ultimately determined the methods by which assignments were performed 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 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. As acknowledged by the firm, the worker did not incur economic loss or financial risk. Based on the monthly 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.