

SS-8 Determination—Determination for Public Inspection

Occupation

03FMV Warehouse Worker

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 initiated the request for a determination of his work status as a warehouse worker in tax year 2018, for which he received Form 1099-MISC. The worker stated he was told he would be on a 90-day probation, after which he would become a permanent full-time employee. The worker noted that he started January 15, 2018 and ended the work arrangement June 8, 2018. The firm's business is described as storage and distribution.

The firm's response was a copy of an official job offer as a warehouse associate addressed to the worker, dated May 22, 2018 and the position beginning May 28, 2018. The 'offer' covered the following: hourly pay, paid bi-weekly via direct deposit; standard benefits for full-time employees included healthcare, voluntary vision and dental; vacation and sick pay/personal, and profit sharing and pension plan. The 'offer' outlined the role/responsibilities of the position and upon completion of drug testing and a background check, the signing of the offer agreement by the worker, and completion of new-hire paperwork, the worker would be formally hired.

The firm's POA was contacted for further clarification and he provided the following: the worker performed the tasks as a warehouse worker since day-one despite not having the offer letter until May of 2018; the firm was a very busy growing company and the firm needed the help; the worker was considered probationary and a contractor; during that time, the firm was utilizing a PEO, however, the worker was never put on payroll while the PEO was supposed to be handling the background check and blood test; and, because worker had not gone through the PEO, as a probationary contractor, the firm issued the checks with no taxes withheld.

The worker responded that he was given specific training and instructions on how to fill orders, with the firm determining the methods by which the worker's services were performed. Any problems or complaints encountered by the worker were directed to the firm for resolution. The worker was required to utilize the time clock; he provided his services from 9am to 5pm, Monday through Friday at the warehouse. He was not required to perform the services personally; any additional personnel were hired and paid by the firm.

The firm provided everything needed to perform the job duties. The worker furnished nothing, he did not lease equipment, space, or a facility, and he did not incur any expenses. The firm paid the worker an hourly wage; the customers paid the firm. The worker was not at risk for a financial loss in this work relationship and he did not establish level of payment for services provided or products sold.

There were no benefits extended to the worker during this time. Either party could terminate the work relationship without incurring a liability or penalty. The worker was not performing same or similar services for others during the same time frame.

In a telephone conversation, the worker provided the following: he was referred by a friend that the firm was hiring; he does not recall receiving an EE handbook; he was told the position was 90-day probationary period after which he would be a permanent full time employee; he was told the firm would do background check and blood screening; he had a set schedule and punched a timecard; his supervisor was the warehouse manager; he was paid for hours worked and no taxes were withheld for over the 90 days that he had been told originally; and, it was at 6-months that he decided to move on because he was supposed to have been full-time permanent employee and no taxes were being withheld even after the 90-days.

Analysis

A worker who is required to comply with another person's instructions about when, where, and how he or she is to work is ordinarily an employee. This control factor is present if the person or persons for whom the services are performed have the right to require compliance with instructions. Some employees may work without receiving instructions because they are highly proficient and conscientious workers or because the duties are so simple or familiar to them. Furthermore, the instructions, that show how to reach the desired results, may have been oral and given only once at the beginning of the relationship.

Training a worker by requiring an experienced employee to work with the worker, by corresponding with the worker, by requiring the worker to attend meetings, or by using other methods, indicates that the person or persons for whom the services are performed want the services performed in a particular method or manner. This is true even if the training was only given once at the beginning of the work relationship.

The establishment of set hours of work by the person or persons for whom the services are performed is a factor indicating control. If the nature of the occupation makes fixed hours impractical, a requirement that workers be on the job at certain times is an element of control.

The term "full-time" may vary with the intent of the parties and the nature of the occupation since it does not necessarily mean working an eight hour day or a five or six day week. If the worker must devote substantially full-time to the business of the person or persons for whom the services are performed, such person or persons have control over the amount of time the worker spends working and, therefore, the worker is restricted from doing other gainful work.

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.

A person who can realize a profit or suffer a loss as a result of his or her services is generally an independent contractor, while the person who cannot is an employee. "Profit or loss" implies the use of capital by a person in an independent business of his or her own. The risk that a worker will not receive payment for his or her services, however, is common to both independent contractors and employees and, thus, does not constitute a sufficient economic risk to support treatment as an independent contractor. If a worker loses payment from the firm's customer for poor work, the firm shares the risk of such loss. Control of the firm over the worker would be necessary in order to reduce the risk of financial loss to the firm. The opportunity for higher earnings or of gain or loss from a commission arrangement is not considered profit or loss.

We have considered the information provided by both parties to this work relationship. In this case, the firm retained the right to change the worker's methods and to direct the worker to the extent necessary to protect its financial investment and business reputation and to ensure its customers' satisfaction and that its contractual obligations were met. The worker was not operating a separate and distinct business; the worker did not invest capital or assume business risks, and therefore, did not have the opportunity to realize a profit or incur a loss as a result of the services provided. 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 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.

CONCLUSION

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.