

SS-8 Determination—Determination for Public Inspection

Occupation 03INS Installers	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

Information provided indicated the firm is an overhead door installation company. The worker performs services for the firm as an installer. The firm has consistently issued Form W-2 pay documents each year, with the exception of tax years 2013, 2014 and 2015 when they also issued form 1099-MISC documents.

The firm indicated the worker started work in 2010 and is still employed. He was provided on the job training. Work orders come from the office dispatch person. He performs services eight to five at the firm's customer locations. He is required to perform services personally. The firm hires and pays all workers. The firm provides tools, equipment and materials. The worker provides labor. The firm indicated he is paid by the hour. The customer paid the firm. If they pay the worker, all money is turned over to the firm. The firm does carry workmen's compensation insurance. The worker is provided paid vacations. Either party can terminate the work relationship without incurring a penalty or liability. The firm indicated he is represented as an employee. No explanation was given as to what the income reported on Form 1099-MISC represented. The firm did state in 2014 the worker performed out of town work on a piece work basis.

The worker agrees with the above information except he indicated he was paid on a commission basis, \$80.00 per door.

ANALYSIS

The question of whether an individual is an independent contractor or an employee is one that is determined through consideration of the facts of a particular case along with the application of law and regulations for worker classification issues, known as "common law." Common law flows chiefly from court decisions and is a major part of the justice system of the United States. Under the common law, the treatment of a worker as an independent contractor or an employee originates from the legal definitions developed in the law and it depends on the payer's right to direct and control the worker in the performance of his or her duties. Section 3121(d)(2) of the Code provides that the term "employee" means any individual defined as an employee by using the usual common law rules.

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.

In determining whether an individual is an employee or an independent contractor under the common law, all evidence of both control and lack of control or independence must be considered. We must examine the relationship of the worker and the business. We consider facts that show a right to direct or control how the worker performs the specific tasks for which he or she is hired, who controls the financial aspects of the worker's activities, and how the parties perceive their relationship. The degree of importance of each factor varies depending on the occupation and the context in which the services are performed.

Therefore, your statement that the worker was an independent contractor pursuant to an 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.

Analysis

The withholding of income tax or the Federal Insurance Contributions Act (FICA) tax from an individual's wages is "treatment" of the individual as an employee, whether or not the tax is paid over to the Government. The filing of an employment tax return and Form W-2 for a period with respect to an individual, whether or not tax was withheld from the individual, is "treatment" of the individual as an employee for that period.

The worker received a Form W-2 and a Form 1099-MISC from you in the course of the work relationship, and the services did not substantially change. As previously stated, the issuance of Form W-2 and/or the withholding of taxes on income for an individual would be considered treatment of the individual as an employee, and would apply in this case.

Conclusion:

Based on the above analysis, we conclude there is an erroneous misclassification of wages. All services appeared to have been performed under the firm business name, utilizing the firm's equipment and supplies. The worker has consistently been employed by the firm and works on a full time basis. Whether paid by the hour or on a piece work basis, the services are performed for the firm, as assigned. The worker does not own and operate his own business.