

SS-8 Determination—Determination for Public Inspection

Occupation
03INS Installers

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

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Facts of Case

The firm is in the business of providing gutter installation. The worker was engaged as an installer. The worker received a Form 1099-MISC for his services in 2017 and 2018 as well as a Form W-2 in 2018. The worker also received Form 1099-MISC from related entities under the same ownership, in 2014 to 2017. There was no written agreement.

According to the worker, the firm provided instructions on how to use machinery and perform the installation, although the firm noted that the worker needed no instructions as he was experienced in gutter installation. Both parties agreed that the worker received his work assignments daily from the firm. Each indicated that the other determined the methods by which the assignments were performed; but both agreed that the firm would be contacted if any issues or problems arose. Both also agreed that there were no required reports. The worker was part of a work crew that traveled to the job sites together. The worker was scheduled to start work in the mornings until the tasks were completed at the various job sites. The firm noted that there was no schedule to follow. The worker attended staff meetings; the firm disagreed. Both parties agreed that the worker was required to provide the services personally with only the firm hiring and paying any substitute workers.

According to the worker, the firm provided the truck, materials, gas, drill, rivet gun, and shirts; the firm indicated that it provided nothing. The worker supplied a tool belt, hammer, tape measure, metal sheers, chisel, boots, and hardhat. He was not reimbursed for any of these expenses. The worker was paid an hourly rate. Both agreed that the customer paid the firm. The firm carried workers' compensation insurance on the worker. The worker did not establish the level of payment for services.

There was disagreement on whether there were benefits provided by the firm. Both parties agreed that either party could terminate the relationship without incurring a liability. The worker did not perform similar services for others during the same time period though the firm disagreed. The worker performed his services as part of a work crew. The relationship has ended.

Analysis

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. The relationship of the worker and the business must be examined. 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 should be considered. The determination of the worker's status, then, rests on the weight given to the factors, keeping in mind that no one factor rules. The degree of importance of each factor varies depending on the occupation and the circumstances.

Factors that illustrate whether there is a right to control how a worker performs a task include training and instructions. 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. The firm obtained the installation jobs and remained responsible to the customers. The worker may have been experienced as he worked for the firm or its related entities throughout a number of years. The firm gave the worker, as part of its installation crew, his work assignments which told him where to go, when to go and what the job entailed. While the work schedule may have varied, dependent on the jobs and the weather, 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. As part of a work crew, the worker performed performed services in the order or sequence set by the firm. That factor shows that the worker was not free to follow the worker's own patterns of work. Often, because of the nature of an occupation, the person or persons for whom the services are performed do not set the order of the services or set the order infrequently. However, if the person or persons retain the right to control the order or sequence of the work, this is sufficient to indicate an employer-employee relationship. Furthermore, the worker provided his services to the firm throughout a number of years on a continuous basis. A continuing relationship between the worker and the person or persons for whom the services are performed indicates that an employer-employee relationship exists. A continuing relationship may exist where work is performed in frequently recurring although irregular intervals.

Factors that illustrate whether there is a right to direct and control the financial aspects of the worker's activities include significant investment, unreimbursed expenses, the methods of payment, and the opportunity for profit or loss. In this case, 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. The worker had no significant investment and therefore, no risk. Lack of significant investment by a person in facilities or equipment used in performing services for another indicates dependence on the employer and, accordingly, the existence of an employer-employee relationship. 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. In addition, the worker's hourly rate of pay also indicated an employer-employee relationship. 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.

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. There was no written agreement. The worker was engaged to provide the necessary labor for the firm's gutter installation business. When doing so, the worker was not engaged in a separate business venture. The fact that he may have had experience in gutter installation, did not make him self-employed. 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.

Based on the above analysis, we conclude that the firm had the right to exercise direction and control over the worker for the entire work relationship to the degree necessary to establish that the worker was a common law employee and not an independent contractor operating a trade or business.

Please see Publication 4341 for guidance and instructions for firm compliance.