

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

The worker submitted a request for a determination of worker status in regard to services performed for the firm from February 2017 to December 2019 as a tile setter. The services performed included the preparation of tile surfaces and the installation of tile and grout. The firm issued the worker Form 1099-MISC for 2017 through 2019. The worker filed Form SS-8 as he believes he received Form 1099-MISC in error.

The firm's response states it is a flooring showroom business, which offers sales and installation. The worker was engaged as a tile installer. The worker was classified as an independent contractor as he signed Form W-9 and did not want to be hired. He was paid weekly based on the jobs completed and provided his own tools and transportation. There was no written agreement between the parties; only the Form W-9.

The firm stated that as the worker was an experienced tile installer, it did not provide him specific training or instruction. Work orders were provided in connection with jobs assigned to the worker. The firm determined the methods by which assignments were performed and assumed responsibility for problem resolution. Reports and meetings were not required. The worker's hours varied based on the job. Once the work order was completed, he was done. Services were performed at customers' homes and job sites. The firm required the worker to personally perform services. The firm was responsible for hiring and paying substitutes or helpers. The worker stated the firm provided him direction on how the tile was to be installed. Reports included daily text message updates to the firm and time cards; copies were provided for our review. The firm required he attend staff meetings.

The firm stated it provided tile and setting materials. The worker provided tools. The worker did not lease equipment, space, or a facility. The worker incurred the unreimbursed expense associated with tools, gas, and mileage. Customers paid the firm. The firm paid the worker an hourly rate of pay; a drawing account for advances was not allowed. The firm did not carry workers' compensation insurance on the worker. The worker established the level of payment for the services provided. The worker stated the firm also provided a company vehicle, logo t-shirts, in addition to paying for fuel and tolls. He did not incur expenses in the performance of services for the firm. He did not incur economic loss or financial risk. The firm established the level of payment for the services provided.

The firm stated the work relationship could be terminated by either party without incurring liability or penalty. It is unknown if the worker performed similar services for others; the firm's approval was not required for him to do so. The worker advertising was not applicable. The firm represented the worker as a subcontractor to its customers. Services were performed under the firm's business name. The work relationship ended when the worker stopped asking for work. The worker stated the firm provided him the benefit of paid vacation time, sick pay, paid holidays, personal days, bonuses, and inexpensive tools such as trowels and grout floats. He did not perform similar services for others as he worked full-time for the firm. The firm represented him as an employee to its customers. The work relationship ended when the firm fired him.

The worker signed Form W-9, Request for Taxpayer Identification Number and Certification, on March 14, 2017. It documents the worker name, address, and Social Security number. It does not document a business name or employer identification number. There was no box checked for federal tax classification.

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. The firm provided work assignments, 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 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, 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 hourly 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.