

SS-8 Determination—Determination for Public Inspection

Occupation

03MIS Mason Laborer

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 firm is in the business of providing masonry services to prime contractors. The worker was engaged to provide midlevel masonry services. He received a Form W-2 and Form 1099-MISC for services in 2016 and only a Form 1099-MISC in 2017. There were written agreements which were signed and dated at the beginning of each time period, yet each reflected the exact amount of the 1099 issued at the end of each year..

The worker indicated that he was a skilled masonry worker but that the firm told him what needed to be done, when and how; the firm agreed that there was no training. The worker received his work assignments verbally from the firm or the project manager; both parties agreed that the firm would be contacted if any issues or problems arose. Each party indicated that the other determined the methods by which the assignments were performed. The firm indicated that they obtained a contract and subcontracted the work out to the worker under a written agreement. There were no required reports although the firm indicated that there was a visual inspection of workmanship. The worker noted that he reported to the jobsite in the morning and worked through the end of the day, Monday through Friday, under supervision of the firm or project manager at the customer locations. However, the firm noted that he came and went at his own discretion and that the firm was not always on customer jobsites to oversee his services. The worker was to provide the services personally with only the firm paying and hiring any substitute workers; the firm disagreed and noted that the worker brought workers with him.

According to the worker, the firm provided all materials, major tools, safety vests, and helmets; however the firm noted that they only supplied the materials. The worker provided uniforms and hand tools. He was not reimbursed for tools, safety boots, or transportation costs. The firm noted that he was paid by the hour and had the risk of tool loss or damages as well as insurance though no proof of liability insurance was provided. Checks were issued weekly. The customer, the prime contractor, paid the firm. The worker did not establish the level of payment for services though the firm noted that the worker established his own rate of pay.

Both the firm and the worker agreed that there were no benefits other than a bonus mentioned only by the worker. Both noted 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; the firm disagreed. 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 provided masonry services and obtained the jobs through prime contractors. The worker was engaged to provide masonry services in order for the firm to fulfill its obligations. The worker was an experienced and skilled masonry laborer and therefore, needed no additional training. However, he did require instructions regarding the services he performed. 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. The firm noted that the worker could come and go from the jobsite as he pleased; this was not reasonable as there were likely time deadlines and other work dependent on the progress of the worker's tasks. The establishment of set hours of work by the person or persons for whom the services are performed is a factor indicating control; however, 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 worker's services were continuous and not just a one-time event. 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. 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. The worker simply received an hourly rate of pay and had no other economic risk other than the loss of his compensation. 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 were no benefits; there were written agreements. The firm's belief 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.

The worker was engaged to provide masonry labor in the firm's business providing masonry services. When working for the firm, the worker was not engaged in a separate business venture. 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.

It is acknowledged that the worker received pay documents reflecting his services as both an independent contractor and as an employee. In *Bartels v. Birmingham*, 332 U.S. 126, 1947-2 C. B. 174, the Supreme Court stated that whether there is an employment relationship is a question of fact and not subject to negotiation between the parties. So, in other words, the type of relationship cannot simply be agreed upon by the parties, or switched back and forth, when the facts support otherwise.

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.