

SS-8 Determination—Determination for Public Inspection

Occupation

Construction/Technical Services/Trades

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 submitted a request for a determination of worker status in regard to services performed for the payer from November 2017 to February 2018. The work done by the worker included operating the chain saw and wood splitter; loading, unloading, and stacking wood. The payer issued the worker Form 1099-MISC and Form W-2 for 2017. A copy of the 2018 tax reporting document(s) was not provided for our review. The Form 1099-MISC was issued for cutting firewood. The Form W-2 was issued for full-time weekly work. The worker filed Form SS-8 as he believes he erroneously received Form 1099-MISC.

The payer's response states it is a tree removal and stump grinding business. The worker was engaged to perform two different services. He was classified as an employee when working as an on-site groundsman in connection with tree removal services. The worker was told what hours to work, when he could leave, and how to perform the work. He was classified as an independent contractor when cutting firewood and mowing grass as he was not a part of the payer's primary tree removal operation. The worker determined his work hours and he was not instructed what or how to do the work. There was no written agreement between the parties.

As the worker does not dispute his employment classification, the following facts relate to the firewood and grass mowing services performed.

The payer stated it did not provide specific training or instruction to the worker in connection with cutting firewood and mowing grass. The worker requested to cut firewood and he was paid by stacks completed. He was paid a set amount for mowing grass. There was no assigned amount of firewood required and work was completed at the worker's leisure. The worker determined the methods by which firewood was cut. The payer was contacted and assumed responsibility for problem resolution as the payer's wood splitter was borrowed for cutting wood. Reports and meetings were not required. The worker was paid after work was completed. Cutting firewood and mowing grass was performed on the payer's property. The payer did not require the worker to personally perform services. The worker stated the payer's foreman showed him how to use the payer's equipment. The payer provided work assignments and determined the methods by which assignments were performed. The payer required him to personally perform services.

The payer stated it provided the log splitter and mower. The worker did not lease equipment, space, or a facility. It is unknown if the worker incurred expenses in the performance of services for the payer or if he incurred economic loss or financial risk. The worker was paid piece work for cutting firewood; a drawing account for advances was not allowed. Establishing the level of payment was not applicable. The worker stated the payer provided all supplies and equipment. He did not incur expenses in the performance of services for the payer. The payer paid him daily or by each stack of wood. He was allowed a drawing account for advances, when needed. Advances came out of (future) pay. He did not incur economic loss or financial risk. The payer established the level of payment for the services provided.

Benefits were not provided. The work relationship could be terminated by either party without incurring liability or penalty. The payer stated the worker did odd jobs for others while performing services for the payer. He was not required to obtain the payer's approval to do so. The worker did not advertise. Due to foot pain issues, the worker was unable to wear boots and stand for long periods of time. While cutting firewood and mowing grass, he worked on his own schedule, taking as many breaks as needed. He was only responsible for getting the job done at his pace. The worker stated he did not perform similar services for others. The work relationship ended when the payer stopped working him.

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.

In this case, cutting firewood and mowing grass services performed by the worker were integral to the payer's needs. The payer made work assignments available to the worker and assumed responsibility for problem resolution involving its equipment. These facts evidence the payer retained the right to direct and control the worker to the extent necessary to ensure satisfactory job performance in a manner acceptable to the payer. Based on the worker's work experience and work ethic the payer may not have needed to frequently exercise its right to direct and control the worker; however, the facts evidence the payer retained the right to do so if needed.

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 payer's customer for poor work, the payer shares the risk of such loss. Control of the payer over the worker would be necessary in order to reduce the risk of financial loss to the payer. The opportunity for higher earnings or of gain or loss from a commission arrangement is not considered profit or loss. 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 piece work or set amount 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 payer's business needs. 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 payer 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 payer can obtain additional information related to worker classification online at www.irs.gov; Publication 4341.