

SS-8 Determination—Determination for Public Inspection

Occupation 03MIS Miscellaneous Laborers	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 payer from January 2017 to December 2017 as a gardener. The payer issued the worker Form 1099-MISC for the year in question. The worker filed Form SS-8 as she believes she erroneously received Form 1099-MISC for 2017. Similar services were performed in 2016.

The payer's response states she is an individual with two gardens. One at her home and one at her rental property. The worker was engaged as a gardener. The worker was classified as an independent contractor as she was a freelance worker. She came when she wanted to and did the job with little instruction. The worker informed her when she worked and how many hours. Similar services were also performed from 2015-2016. Services were performed under a verbal agreement where the payer told the worker how much she would pay per hour. Form 1099-MISC was issued for 2016 and 2017.

The payer stated she sometimes provided specific instruction related to services performed. If problems or complaints arose, the payer was contacted and assumed responsibility for problem resolution. The payer sometimes asked the worker to report on weekly services performed. The worker's daily routine was unknown; however, the payer did, at some point, put a cap on the worker's hours. Services were performed at the payer's house and rental property. Meetings were not required. The payer required the worker to personally perform services. If substitutes or helpers were needed, the worker hired them. The payer believes this only happened once. The worker stated the payer instructed her to make things look nice. Work assignments were provided verbally. Her work routine was as-needed, at least four times a week. The payer was responsible for hiring and paying substitutes or helpers.

The payer stated she provided almost everything. The worker may have provided a few gardening tools on occasion. The worker did not lease equipment, space, or a facility. To the payer's knowledge, the worker did not incur expenses. The payer paid the worker an hourly rate of pay; a drawing account for advances was not allowed. The payer did not carry workers' compensation insurance on the worker. The worker did not incur economic loss or financial risk. The payer initially set the level of payment for the services provided. The worker then informed her that she wanted more and set the price for services provided. The worker stated she did not establish the level of payment for the services provided.

Benefits were not provided. The work relationship could be terminated without penalty. The payer stated the worker performed similar services for others. The payer's approval was not required for her to do so. There was no agreement prohibiting competition. The payer represented the worker as an individual to others. The payer released the worker. The worker stated she did not perform similar services for others. The work relationship ended by agreement.

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 general, domestic services include services of a household nature in or about a private home performed by cooks, waiters, butlers, housekeepers, maids, valets, babysitters, janitors, laundresses, caretakers, handymen, gardeners, grooms, chauffeurs of family-use vehicles, and companions for convalescents, the elderly, or the disabled. A private home is a fixed place of abode of an individual or family.

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 payer required the worker to personally perform services. The payer provided specific instruction related to services performed, required the worker to report on services performed, and assumed responsibility for problem resolution. 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 education, past 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.

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 payer 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 payer 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. As acknowledged by the payer, the worker did not incur economic loss or financial risk. 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 payer's gardening 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 926 and Publication 4341.