

SS-8 Determination—Determination for Public Inspection

Occupation

03MIS Miscellaneous Laborers

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's response was signed by the proprietor. The firm's business is insulation and the worker provided services as general clean-up on job sites. In a subsequent conversation the firm stated the worker only worked for the firm part-time about 15-20 hours per week; because he worked for others although he was not sure what the worker did. The firm obtained the contract; the firm determined the number of guys needed to prep the job (put up plastic and cardboard over windows and doors) and then to do clean-up (the removal of plastic, cardboard, and the foam trimmed off), with the firm providing brooms and trash bags. The firm stated he generally called the same guys, including the worker, to do prep/clean-up; the worker did mostly clean-up.

The worker indicated he was given specific training and instructions on how to operate the machinery, how to blow in cellulose, how to blow in spray foam, and how to back up the equipment trailer. The job assignments were given day-to-day verbally or via texting; and, it was the firm that determined the methods by which the worker's services were performed. Any problems or complaints encountered by the worker were directed to the firm for resolution. The services were rendered after meeting at the shop for 7am, loading trailers, then going to job site, with the day ending at the discretion of the firm. The worker was not required to perform the services personally; any additional personnel were hired and paid by the firm.

The firm responded that the worker was given general instructions and needs and told of the job site location. The worker received the job assignments via phone calls. The firm's project site manager determined the methods by which the worker's services were performed; any problems or complaints encountered by the worker were directed to the firm's project site manager for resolution. There was no set schedule; the worker's services were rendered as needed. The worker was required to perform the services personally.

The worker stated the firm provided all tools, equipment, materials, supplies, vehicle, and hotel rooms, if needed. The worker furnished nothing, he did not lease equipment, space, or a facility, and did not incur expenses in the performance of the services for the firm. The firm paid the worker an hourly wage; the customers paid the firm. The worker indicated he was not covered under the firm's workers' compensation insurance policy, he was not at risk for a financial loss in this work relationship, and he did not establish the level of payment for services provided.

The firm replied that the firm provided brooms and trash bags; and, the worker furnished tools (hammer & pry bar). The firm acknowledged the worker did not lease equipment, space, or a facility, was paid an hourly wage, with the customers paying the firm, and was covered under the firm's workers' compensation insurance policy. The worker was at risk for a financial loss in this work relationship if there was damage to the job site during clean-up; however, the firm stated in a conversation the worker was not required to carry liability insurance coverage, since the firm carried it. The worker did not establish level of payment for services provided and/or products sold.

Both parties concur that there were no benefits extended to the worker and that either party could terminate the work relationship without incurring a liability or penalty. The firm stated the worker was working for others but he didn't know what work he was doing; the worker disagreed stating he was not performing same or similar services for others during the same time frame.

Analysis

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.

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.

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.

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. Also, if the firm has the right to control the equipment, it is unlikely the worker had an investment in facilities.

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 firm's customer for poor work, the firm shares the risk of such loss. Control of the firm over the worker would be necessary in order to reduce the risk of financial loss to the firm. The opportunity for higher earnings or of gain or loss from a commission arrangement is not considered profit or loss.

We have considered the information provided by both parties this work relationship. 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 and business reputation and to ensure its customers' satisfaction and that its contractual obligations were met. The worker was not operating a separate and distinct business; 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. 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. 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.

CONCLUSION

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.