

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 worker submitted a request for a determination of worker status in regard to services performed for the firm from May 2019 to September 2019 as a painter. The firm issued the worker Form 1099-MISC for 2019. The worker filed Form SS-8 as they believe they received Form 1099-MISC in error. There was no written agreement between the parties. The worker feels they were an employee because the firm paid them hourly and supervised their work, provided the worker with a schedule, and provided all equipment and supplies for the job duties.

The firm's response states it is an exterior and interior painting company. The work provided by the worker was painting and general labor. The worker was requested to provide painting services at customer locations under the supervision of another subcontractor hired by the firm. The firm states that the worker made their own hours and therefore they were an independent contractor.

The firm states that they presented the worker with each project contract so that the job goals were clearly defined. The worker performed services under the direction of another subcontractor of the firm. The worker determined the methods by which job assignments were performed. The worker reported any problems or complaints to the firm's subcontractor and the subcontractor and original contractor were responsible for problem resolution. The worker was required to provide the firm with project status reports on a weekly basis. The worker provided services between the hours of 8am and 1pm at the subcontractor's discretion due to the residential nature of the jobsites. The worker performed services 100% of the time at customer locations. There were no meetings required of the worker, and the firm required the worker to perform all services personally. Substitutes or helpers were not applicable to the work relationship. The worker states that the firm would text the worker to meet them at the firm owner's house. The firm owner would then go over specific jobs and assignments with the worker. The worker received tasks directly from the firm owner, who also determined the methods by which tasks were completed and assumed responsibility for problem resolution. The worker would provide the firm owner with their time worked and would report progress on projects daily. The worker had to provide their availability to the firm owner every weekend. The worker would be transported by either the firm owner or themselves to the job site. They would prep the painting area and commence painting. All equipment used belonged to the firm. The worker would perform services at job sites for about 9 hours and roughly 2 hours would be spent meeting with the firm owner at their residence. The worker states that disciplinary meetings were held for unsatisfactory performance, and attendance was required or the worker would be fired. The worker states that the firm owner's wife was responsible for hiring any additional help needed, and the firm owner was responsible for paying any help.

The firm states that they provided paint, major power tools, etc. The worker was required to provide paintbrushes and minor tools. The worker did not have to lease any space, facilities, or equipment. There were no expenses incurred by the worker. The worker was paid an hourly wage by the firm. Customers of the firm would pay the firm for services rendered. The firm did not carry worker's compensation insurance on the worker. The worker faced no economic loss or financial risk. The firm set the level of payment for services rendered. The worker states that the firm provided ladders, extension rods, brushes, tarps, drop cloths, tape, buckets, paint, paint guards, tools, construction materials, and sanders. The worker provided their own personal brush. The worker would occasionally purchase supplies on the firm's behalf, and the firm would usually reimburse the worker for these expenses. The worker was paid an hourly wage by the firm. They did not have access to a drawing account for advances. Customers paid the firm. If supplies or equipment were damaged, the firm owner would sometimes withhold payment of wages from the worker's paychecks. The firm owner set the level of payment for services rendered.

The firm owner states that they did not provide the worker with any benefits. The relationship between the parties could be terminated by either party without liability or penalty. The firm states that the worker performed similar services for other firms during the work relationship and the firm did not require approval to do so. The firm states that there was a non-compete agreement between the parties pertinent to the firm's clients only. The worker was not a member of a union. The worker did not advertise their services to the public. The worker was required to return any finished products to the firm. The worker was represented to the firm's clients as a subcontractor. The firm states that the work relationship ended when the job was completed. The worker states that they did not provide similar services to other firms during the course of the work relationship. The worker states that there was no formal non-compete agreements ever reached between the parties. The worker was not a member of a union. The worker states that the firm owner would refer to the workers as his "crew" when referring to them to customers. The worker states that the work relationship ended when there was a dispute over withheld pay. The worker would hand out business cards on behalf of the firm and was requested by the firm to upsell services provided by the firm.

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 of painting. The firm provided work assignments by virtue of the customers served, required the worker to report on services performed through time sheets and project reports, 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, day, 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.