

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**

CASE FACTS: The firm provided residential and commercial cleaning services. The firm engaged the worker as part of its cleaning crew. The worker was to clean spaces that were assigned to him by the firm. The firm stated the worker was hired temporarily to help with primarily with some of the larger jobs the firm had acquired. They also contended the worker was aware he was going to receive a MISC-1099. The worker submitted a Form SS-8 after received a Form 1099-Misc from the firm. The firm replied with a Form SS-8.

The firm provided training, instructions, and supervision as to the details and means by which the worker was to perform the services. Both parties agree:

- The worker received his work assignments from the owner of the firm
- The firm determined the methods by which those assignments were performed
- The worker was required to contact the owner of the firm if problems or complaints arose.

According to the firm, the worker was required to submit time sheets. He describes his daily routine as he would show up at the firm's location for roll call. He would receive his assignments daily. After he had completed his assignments, he would return any equipment he used in performing the services to the firm at the end of the day. However, the firm specified the worker did not work for him on a regular basis. When the worker did work, he would meet the owner or another subcontractor at a common place and carpool. He performed the services on the premises of the firm's customers. The relationship between the parties was continuous, as opposed to a one-time transaction. The nature of this relationship contemplated that the worker would perform the services personally. The worker worked exclusively and on a continuing basis for the firm. His services were an integral and necessary part of the services the firm provided to its customers. The firm hired and paid any substitutes or helpers.

The firm furnished the worker with all the necessary supplies, equipment, and materials, at no expense to him. The worker did not lease equipment. The firm determined the fees to be charged. The worker did not incur any significant business expenses and was not reimbursed by the firm. The worker was paid an hourly wage. The firm did not allow the worker a drawing account, or advances against anticipated earnings. The firm's customers paid the firm. The firm established the level of payments for the services provided. The firm did not carry worker's compensation insurance on the worker. The worker did not have a substantial investment in equipment or facilities used in the work and did not assume the usual business risks of an independent enterprise.

The worker was not eligible for sick pay, vacation pay, health insurance, or bonuses. Either party could terminate the worker relationship at any time without incurring a penalty or liability. The worker was not a member of a union. According to internal research, the worker did not perform the services for others. He did not advertise his to the public or maintain an office, shop, or other place of business. He was required to perform the services under the name of the firm and for the firm's customers. The relationship between the parties has ended. The worker resigned from 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.

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.

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.

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.

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. 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.

Based on the common-law principles, the firm had the right to direct and control the worker. The worker shall be found to be an employee for Federal tax purposes.

The firm can obtain additional information related to worker classification online at www.irs.gov; Publication 4341