

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 is seeking a determination of worker classification for cleaning services performed for the firm from February 2019 until February 2020. The worker received a 1099-MISC from the firm for 2019 and a 1099-NEC from the firm for 2020. The worker states that they were misclassified by the firm as an independent contractor because the worker was a regularly scheduled employee and was told when and how to work. There were no written agreements between the parties.

The firm states that they provided maintenance and cleaning services. The worker was requested to providing cleaning and maintenance services to clients of the firm. The firm classified the worker as an independent contractor and states that the worker was self-employed. The firm provided a copy of the worker's W-9 Form, the worker's license and social security card, and balance sheets showing payments made to the worker.

The firm states that the worker was given training and instruction. The worker would provide cleaning services for 4 hours a day at a given office location. The worker received job assignments through the firm's owner. If the worker encountered any problems or complaints during their job duties, they were required to contact the firm's owner for problem resolution. The worker would provide their worked hours to the firm's owner through phone calls. The worker provided services for 4 hours during their given availability at an office location. There were no meetings require of the worker. The firm required the worker to personally provide services. The owner was responsible for hiring and paying all helpers and substitutes needed. The worker states that the firm instructed the worker on how to clean a specific location and where supplies were located. The worker received job assignments by phone calls and text messages. The firm's owner determined the methods by which job assignments were performed and assumed responsibility for problem resolution. The worker provided the firm with location tracking and text messages to inform the owner when the worker was arriving or leaving their job site. The worker provided services for the firm from Monday through Friday, 5:30pm until 9:30pm. The worker would arrive at the location, report arrival to the firm's owner via text message or GPS location sharing, take off personal belongings in the supply room, and begin cleaning at the location. The worker provided services at a specific office location. There were no meetings required of the worker, and the worker was required to personally perform services. The firm owner was responsible for hiring and paying all helpers and substitutes needed.

The firm states that they provided the worker with cleaning supplies. The worker did not provide or lease anything for their job duties. The worker did not incur any expenses and was paid on a piecework basis. The worker did not have access to a drawing account for advances. The customers paid the firm for cleaning services provided. The firm did not carry worker's compensation insurance on the worker. The worker had no exposure to economic loss or financial risk. The owner established the level of payment for services provided. The worker states that the firm owner was responsible for ordering all cleaning supplies. The worker incurred no expenses and did not lease anything. The firm paid the worker an hourly wage. The worker did not have any access to a drawing account for advances. Customers paid the firm. The firm's owner established the level of payment for services.

The firm states that there were no benefits offered to the worker. The relationship between the parties could be terminated by either party without liability or penalty. The worker did not perform similar services for other firms. There were no non-compete agreements in place between the parties. The worker was not a member of a union and did not advertise their services to the public. The worker was required to return all finished products to the firm. The worker was represented by the firm as a contractor. The worker quit and ended the work relationship. The worker states that they were not offered any benefits. The relationship between the parties could be terminated by either party without liability or penalty. The worker did not perform similar services for other firms and did not advertise their services to the public. The worker was not a member of a union. The worker was represented by the firm as the cleaning crew performing services under the firm's name. The worker quit for personal reasons, ending the work relationship.

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, co-adventurer, 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 providing cleaning services. The firm provided work assignments by virtue of the customers served, required the worker to report on services performed through GPS tracking and text messages, 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 firm provided all supplies necessary for the worker's job duties. 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 cleaning 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.