

SS-8 Determination—Determination for Public Inspection

Occupation 03PMW Repair/Maintenance Worker	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

It is our usual practice in cases of this type to solicit information from both parties involved. Upon the submission of the Form SS-8 from the worker, we requested information from the firm concerning this work relationship. The firm responded to our request for completion of Form SS-8.

From the information provided the firm is a recreational vehicle (RV) park and storage business and the worker was engaged from 2007 to 2017 as a maintenance worker. The worker's duties included the maintenance of the lawns and the firm's equipment. The firm believes the worker was an independent contractor (IC) while performing services for them because the worker worked without supervision on whatever needed to be done, he decided what needed to be done each day, many jobs he stated he would not and did not do, he had skills that they needed and they did not train him, the worker was not eligible for any benefits except for time off pay as a bonus for work done, and the worker signed IC forms on the first day of work. The firm states that in addition, once while weed eating, the worker broke a tenant's car windshield with a rock; as an IC the worker paid for a new windshield for that tenant.

The firm states they provided no training or instructions to the worker and the worker determined what assignments/tasks he needed complete and how he would complete his assignments. The worker was required to personally perform his services on the firm's premises and the firm states the worker was responsible for the resolution and taking care of any problems or complaints that arose. The firm states the worker's routine consisted of maintaining lawns and equipment and his hours were variable and determined by the worker. The worker was not required to submit reports or attend meetings. The firm states the worker was responsible for the hiring of substitutes or helpers and they were responsible for the paying of these individuals.

The firm states they provided the equipment, mowers, tractor, ditch witch, weed eaters, trucks, and trailers to the worker in order to perform his services and the worker occasionally provided small tools and a portable welder. The firm states the worker did not incur expenses, he was paid at an hourly rate, and he incurred a loss due to the replacement of a tenant's windshield.

The firm states the worker had a significant investment in tools and equipment and the worker told them that he often worked in the evenings and weekends for others. The worker was not reimbursed for any of the personal tool expense. The firm states the worker kept his plumber's license current in order to do work when and where he wanted.

The firm states the worker was eligible for bonus pay. The worker performed similar services for others but did not advertise his services. The firm states the worker was represented as a maintenance man. Either party could terminate the work relationship at any time without either party incurring a liability.

The firm states the worker started performing services as an independent contractor in 2007 and his status was made quite clear to him when he began. The firm states they informed the worker that his independent contractor status would remain in effect for whatever time he performed services for them. The firm states the worker was paid in cash and was given a 1099-MISC for all work performed. The firm states there was never any question about the worker status while he was performing services for them.

Analysis

It can be very frustrating to both the firm and the worker when a work relationship begins and both appear to be on the same page as to the work to be done and the status of the worker. What may appear to be a general overview given to a worker of what takes place at the firm's premises and how they like it done without specific instructions given, in the progression of the work relationship, additional questions are asked – answers are given, and each party begins to perceive the relationship differently. Our job then is to look at the facts of the work relationship and differentiate what services were performed, what was the intent of the relationship between the parties, did the worker have autonomy from the firm, was he operating his own business, and how much control, if any, did the firm have over a worker.

As is this case and in almost all worker classification cases, some facts point to an employment relationship while other facts indicate independent contractor status. The determination of the worker's status, then, rests on the weight given to the factors, keeping in mind that no one factor rules. Evidence of control generally falls into three categories: behavioral control, financial control, and relationship of the parties, which are collectively referred to as the categories of evidence. In weighing the evidence, careful consideration has been given to the factors outlined below.

Factors that illustrate whether there is a right to control how a worker performs a task include training and instructions. In this case, the worker was experienced in this line of work and did not require training or detailed instructions from the firm. The need to direct and control a worker and his services should not be confused with the right to direct and control. Even when a company allows a worker considerable latitude in performing their services, the retention of the right to give instructions or directions, without exercising that right, is enough to make the worker an employee. An experienced worker is free and is expected to exercise his or her own judgment and initiative and is many times hired due to their experience and knowledge. However, the worker's position was that of a maintenance worker overseeing the firm's RV park and storage facility acting for and on behalf of the firm and not that of an independent contractor acting for and on his own behalf. The firm retained the right to issue general instructions as to the means to be used to complete the worker's assignments.

Subcontractors are truly independent of a firm and a firm's business. Some of the characteristics of subcontractors are that they will not consider a firm as their boss, they will have a contract for each job, they will carry their own insurance, they will pay their own helpers and labor costs, they will not have to personally perform their services but have the ability to have anyone they engage perform services since that person would be representing the subcontractors business, and they would have their own business bank account and credit lines. Subcontractors will file tax returns and conduct themselves as real businesses. Subcontractors will dictate what services their business offers and how they process and perform those services, and how much it would charge for those services. We did not find that the worker had this freedom or autonomy. There was no evidence presented and through our thorough research from various sources available to us, found no evidence that the worker operated a business, advertised his services to the public, had obtained a business license or had a business registration in the state which he performed services.

Factors that illustrate whether there is a right to direct and control the financial aspects of the worker's activities include significant investment, unreimbursed expenses, the methods of payment, and the opportunity for profit or loss. In this case, 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. While the worker provided his own hand tools and occasionally provided a portable welder, this is not considered a significant investment. The term "significant investment" does not include tools, instruments, and clothing commonly provided by employees in their trade; nor education, experience or training.

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. Both parties retained the right to terminate the work relationship at any time without incurring a liability.

If a firm has to make a worker "understand" or "agree to" being an independent contractor (as in a verbal or written agreement or the filing of a Form W-9), then the worker is not an independent contractor. An individual knows they are in business for themselves offering their services to the public and does not need to be made aware of, understand, or agree to be an independent contractor.

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, the firm's statement that the worker was an independent contractor pursuant to an 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.

If a worker performs more than de minimis services for a multiple of unrelated persons or firms at the same time, that factor generally indicates that the worker is an independent contractor. It is possible for a person to work for a number of people or firms concurrently due to financial need and the supporting of oneself and be an employee of one or all of whom engages him.

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.