

**SS-8 Determination—Determination for Public Inspection**

Occupation

03PMW Repair/Maintenance Workers

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 initiated the request for a determination of his work status as a shop hand – he cleaned engine parts and assisted mechanics when needed in tax years 2016 and 2017. The firm's business is described as diesel mechanics.

The firm's response was signed by the president. The firm's business is described as marine repair with the worker having performed services assisting in boat repairs.

According to the firm, there was no specific training or instructions given to the worker. The work assignments were via job order, boat location. The technicians determined the methods by which the assignments were performed; any problems encountered were directed to the firm for resolution. The worker submitted his time for payment. The majority of the worker's time (90%) was spent at the marinas with the remainder of the time at the firm's location. The worker arrived at the opening of business to see if there was work available. The firm indicated the worker was not required to perform the services personally.

The worker responded that he was given training and instructions on how to clean parts. The worker's job assignments were in conjunction with the mechanics. The firm 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 worker's services were rendered 7 am to 4 pm, Monday through Friday at the firm's shop or at the boat marinas. The worker was required to perform the services personally; any additional personnel were hired and paid by the firm.

Both parties acknowledged the firm provided parts, logo shirt, consumables, all special tools and equipment, and billable items. The worker furnished tools and transportation as well as intellectual property; the worker incurred expenses for personal items such as fuel, food, clothing, and phone. The firm paid the worker an hourly wage; the customers paid the firm. The firm and worker concurred that the worker was not covered under the firm's workers' compensation insurance policy. The worker was not at risk for a financial loss. The firm responded that the worker established the level of payment for services provided or products sold; the worker disagreed.

There were no benefits extended to the worker. Either party could terminate the work relationship without incurring a liability or penalty. The worker was not performing same or similar services for others during the same time frame and during his association he was required to wear the firm's uniform.

The worker and firm provided a copy of the letter of agreement as well as 'the agreement'; the worker was to provide services as needed for firm as they pertain to contracts on clients' vessels (the job and related tasks were not defined). There was no guaranteed employment and the worker was responsible for applicable taxes.

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## 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.

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.

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.

We have considered the information provided by both parties to 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.