

SS-8 Determination—Determination for Public Inspection

Occupation 03PMW Repair/Maintenance Workers	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

The worker submitted a request for a determination of worker status in regard to services performed for the firm from January 2017 to March 2017 as a general construction laborer. The work done by the worker included cleaning up residential construction sites. The firm issued the worker Form 1099-MISC for the year in question. The worker filed Form SS-8 as he believes he erroneously received Form 1099-MISC.

The firm's response states it is a real estate services and real estate investment business. The worker was hired on a temporary basis, from January to March 2017, to work on odd jobs at various investment property locations as a handyman. The last check, issued in August 2017, was for post-construction cleaning services at one project/home. The worker was an independent contractor as he was not required to turn in time sheets, he provided his own tools, and he set/coordinated his schedule based on the work to be done. The parties had a verbal agreement. The worker was notified of work that needed to be done and how much time he had to complete it.

The firm stated it did not provide specific training or instruction to the worker. Work assignments were provided via phone call and text. The worker determined the methods by which assignments were performed. The firm's general contractor or designer in charge of the project was contacted if problems or complaints arose. These individuals were responsible for problem resolution. Reports and meetings were not required. The worker was told what work needed to be completed and how long he had to finish it based on the construction time line. The worker planned his day/schedule independently. Services were performed at various investment property locations. The firm required the worker to personally perform services. Hiring substitutes or helpers was not applicable as the worker was not tasked with jobs that required helpers. The worker stated the firm determined the methods by which assignments were performed. His daily routine consisted of 7:30 am to 4:30 pm, Monday through Friday, with some weekends. The firm and worker met at least once per week in person or by phone. The firm was responsible for hiring and paying substitutes or helpers.

The firm stated it provided materials. The worker provided equipment, tools, and transportation. The worker did not lease equipment, space, or a facility. The worker incurring expenses in the performance of services for the firm was none/unknown. Customer paid the firm. The firm paid the worker a weekly rate of pay for on-call handyman services; a drawing account for advances was not allowed. The firm did not carry workers compensation insurance on the worker. It is unknown if the worker incurred economic loss or financial risk. The worker established the level of payment for the services provided. The worker stated the firm provided all supplies. He did not incur expenses in the performance of services for the firm, he did not incur economic loss or financial risk, and he did not establish the level of payment for the services provided. He was paid an hourly rate of pay.

The firm stated the work relationship could be terminated without liability or penalty. The worker did perform similar services for others; the firm's approval was not required for him to do so. The firm represented the worker as a subcontractor to its customers. The work relationship ended when the worker got busy working other jobs. The worker stated the benefits of paid holidays and bonuses were made available to him. He did not perform similar services for others. There was no agreement prohibiting competition between the parties. He advertised the firm's business by wearing a company t-shirt to job sites. The firm represented him as an employee to its customers. The work relationship ended as the firm stated it was going to close the company.

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, the firm's statement that the worker was an independent contractor pursuant to a 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. The firm provided work assignments and ultimately 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, 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 or weekly 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 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.