

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 firm is in the business of operating a fitness center. The worker was engaged to provide cleaning services for the firm's facility. The worker received a 2017 Form 1099-MISC for those services as well as a 2017 Form W-2 for previous front desk duties as well as subsequent cleaning services as an employee. There was a written schedule of work duties; however, no price or 'bid' amount was included with the information provided.

Both the firm and worker agreed that the worker received no training or instructions; she received her assignments via text. The firm indicated that the worker reviewed the facility and put in a bid. Both parties agreed that the worker initially determined the methods by which the assignments were performed; however, the worker noted that eventually the firm's owner did. The firm's general manager would be contacted if any issues or problems arose. No required reports but the worker noted that she would send nightly emails. The worker was responsible for her own work schedule. She worked at the firm's location and at the owner's home though the firm indicated that she worked only at the firm's location. No meetings with the firm. The worker was to provide the services personally; the firm disagreed. The worker noted that she hired one worker; and paid that worker but was paid/reimbursed by the firm to do so. Firm agreed that she hired and paid another worker.

The firm provided most supplies, all chemicals, bottles, bags, brushes and gloves. The worker supplied some tools and supplies. She was reimbursed for extra purchases when she turned over the receipts. The worker noted that she was initially paid hourly; then a lump sum every two weeks. She had no other economic risk. The firm noted that she was paid twice a month. The worker did not establish the level of payment for services though the firm disagreed.

Both the firm and the worker agreed that there were no benefits and that either party could terminate the relationship without incurring a liability. The worker did not perform similar services for others though the firm didn't know. The relationship ended when the worker resigned.

Analysis

In determining whether an individual is an employee or an independent contractor under the common law, all evidence of both control and lack of control or independence must be considered. The relationship of the worker and the business must be examined. Facts that show a right to direct or control how the worker performs the specific tasks for which he or she is hired, who controls the financial aspects of the worker's activities, and how the parties perceive their relationship should be considered. The determination of the worker's status, then, rests on the weight given to the factors, keeping in mind that no one factor rules. The degree of importance of each factor varies depending on the occupation and the circumstances.

Factors that illustrate whether there is a right to control how a worker performs a task include training and instructions. 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. The firm operated a fitness center and needed janitorial/cleaning services to maintain the facility. The worker was engaged to provide those services as she had some previous experience; however, she was not operating a business at the time. Since the worker had previously performed other services for the firm, the parties were familiar with each other and the worker was given considerable latitude in the performance of her duties. She worked according to her own schedule and provided all her services at the firm's premises, also a factor that suggests the firm's ability to retain control over the worker, whether it exercised that right or not. While the worker's services were for a brief period of time, those services were continuous and not just a one-time occurrence. 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.

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. 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. It was the firm that had the investment in the facility and equipment. While both parties provided some tools and supplies, those would not be considered a significant investment by the worker. Also, the worker was reimbursed for the expense of another worker, approved by the firm. There was some disagreement regarding how the worker was paid. The worker noted that she initially received an hourly rate of pay, then a bi-weekly/bi-monthly amount. She had no other economic risk other than the loss of her compensation. 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.

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. There were no benefits and there was no written contract addressing the work arrangement. However, the firm's belief that the worker would be 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. The fact that the worker agreed to accept a Form 1099-MISC pay document did not establish a business presence for the worker. In *Bartels v. Birmingham*, 332 U.S. 126, 1947-2 C. B. 174, the Supreme Court stated that whether there is an employment relationship is a question of fact and not subject to negotiation between the parties.

The worker was engaged to provide cleaning labor for the firm's operation. When doing so, the worker was not engaged in a separate business venture. She did not have a place of business, advertise or hold herself out to the public to provide similar services. 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. After the brief period of time addressed in this case, the firm hired the worker again, this time as an employee for her cleaning services which were necessary for the firm's business operations.

Based on the above analysis, we conclude that the firm had the right to exercise direction and control over the worker for the entire work relationship to the degree necessary to establish that the worker was a common law employee and not an independent contractor operating a trade or business.

Please see Publication 4341 for guidance and instructions for firm compliance.