

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 provides plumbing installations, repairs, and maintenance services. The worker was engaged by the firm as a service technician to perform general installations, repairs, maintenance, and site cleaning after the completion of plumbing jobs. The firm reported the worker's remuneration on Forms 1099-MISC in 2013, 2016, and 2017. The firm submitted statements signed by the worker in 2013 and 2016 stating that he understood that he was an independent contractor and that he was responsible for any injuries he may incur, insurance, and taxes while performing services for the firm.

Information from the parties supports that the firm relied upon the worker's prior training and experience to perform his services. Sometimes the firm called the worker to see if the worker was available to perform a job; sometimes the worker called the firm to see if any jobs were available. The worker guaranteed proper completion of his jobs and had to make arrangements to resolve any problems. The worker notified the firm by phone when jobs were completed. He determined his own schedule. The worker performed his services at the firm's customers' locations. The firm stated that the worker was not required to perform his services personally. The worker selected his own helpers, if needed. The firm paid the worker and any helpers he selected.

The firm provided the backhoe, trailer, jetter and video equipment, cable drain clearing equipment, and vehicles. The worker provided his personal tools, necessary materials, and safety equipment. The firm paid the worker at an hourly rate or by commission, depending upon the job performed. The firm covered the worker under workers' compensation. Customers paid the firm directly at prices established by the firm. Neither party indicated an investment by the worker in the firm or a related business, or the risk of the worker incurring a financial loss beyond the normal loss of compensation.

The firm stated that it did not make benefits available to the worker. It did not prohibit the worker from providing similar services for others during the same time period. There is no evidence submitted showing the worker advertised his services or maintained a business listing. He performed his services under the firm's name. Both parties reserved the right to terminate the work relationship without incurring a penalty or liability, and in fact, the worker terminated the work relationship.

Analysis

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 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 firm has to make a worker "understand" or even if a worker "agreed to" being an independent contractor (as in a verbal or written agreement), this factor does not determine the worker's status as 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.

Factors that illustrate whether there was a right to control how a worker performed a task include training and instructions. In this case, the firm relied upon the worker's prior training and experience to perform his services. 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. The firm must have retained the right to change the worker's methods and to direct the worker to the extent necessary to protect its financial investment and ensure its customers' satisfaction with the work. The worker was required to notify the firm by phone when jobs were completed. A requirement that the worker submit regular or written reports to the person or persons for whom the services are performed indicates a degree of control. The worker had some flexibility to determine his schedule; however, control over the place of work is indicated when the person or persons for whom the services are performed have the right to compel the worker to travel a designated route, to canvass a territory within a certain time, or to work at specific places as required. There is no indication the worker could engage and pay others to perform services for the firm on his behalf. 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. These facts show that the firm retained behavioral control over the services of the worker.

Factors that illustrate whether there was 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. The worker provided his personal tools, materials, and safety equipment. 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. The firm paid the worker at an hourly rate or on a commission basis. Payment by the hour generally points to an employer-employee relationship. The opportunity for higher earnings or of gain or loss from a commission arrangement is not considered profit or loss. These facts show that the firm retained control over the financial aspects of the worker's services.

Factors that illustrate how the parties perceived 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 were part of the service recipient's regular business activities. In this case, the worker was not engaged in an independent enterprise, but rather the plumbing and related services performed by the worker were a necessary and integral part of the firm's business of providing plumbing installations, repairs, and maintenance 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 business. The worker could have provided similar services for others during the same time period; however, it is possible for a person to work for a number of people or firms concurrently and be an employee of one or all of them. The worker terminated the work relationship. If the worker has the right to end his or her relationship with the person for whom the services are performed at any time he or she wishes without incurring liability, that factor indicates an employer-employee relationship. These facts show that the firm retained control over the work relationship and services of the worker.

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.