

SS-8 Determination—Determination for Public Inspection

Occupation

Construction, Trades & Technical Services

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 contracting with businesses to clean their facilities. The worker was engaged to clean the facility designated by the firm. The worker received a Form 1099-MISC for her services in 2016 and 2017. There was no written agreement.

The firm provided initial training for general cleaning; each customer facility being cleaned gave any other needed instructions. The worker received her work assignments from the firm who determined the methods by which the assignments were performed and would be contacted if any issues or problems arose. The firm disagreed and noted the worker determined the methods. No reports other than the worker reporting her time worked at each facility. She had a daily work routine dependent on where she was cleaning. Both parties also agreed that she worked at one of two customers' locations. There were staff meetings; firm disagreed. Both agreed that the worker was required to personally provide the services with only the firm hiring and paying any substitutes.

Both the firm and the worker agreed that the firm provided the cleaning equipment and some supplies. The firm noted that the worker had cell phone, car expenses, meals and insurance for which she was not reimbursed. Both agreed that she was paid by the hour and had no other economic risk. The firm noted that she could request an advance. The customer paid the firm. The worker did not establish the level of payment for services.

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; the firm did not know. Both agreed that the worker performed her services under the firm's name. The worker wore a shirt with firm's name/logo when working. The relationship ended when the worker quit.

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. As is the case 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. 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 obtained the customers and engaged the worker to perform the services outlined in the firm's contract with its customers. The firm remained obligated to its customer to fulfill the contract requirements. The firm had to inform the worker about what was to be done, when it was to be performed, and where the job was. The firm provided some initial training for general cleaning; any specific instructions were given by the customer. 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. The firm indicated that the worker's hourly schedule could vary somewhat; however, if the nature of the occupation makes fixed hours impractical, a requirement that workers be on the job at certain times is an element of control. It is reasonable to assume that the customers' had input as to when they wanted the services performed. If the worker was absent, the firm was responsible for engaging any substitutes as noted in the information provided. In addition, the worker provided the services personally on a continuous basis. 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. The worker had no investment. She received an hourly rate of pay and had no other economic risk other than the loss of that 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. 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.

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 agreement. The worker was engaged to provide labor for the firm's cleaning business. When doing so, the worker was not engaged in a separate business venture. 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.

The firm had indicated that the worker was informed of her status as an independent contractor when hired. However, 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. In other words, the parties cannot simply agree to a type of relationship when the facts of the working relationship supports a different conclusion.

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.