

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 mental health related community services and residential programs. The worker was engaged by the firm to perform maintenance services. The firm reported the worker's remuneration on Forms 1099-MISC from 2009 through 2016.

The agreement between the parties states, among other things, that the worker has agreed to furnish at his own proper cost and expense, maintenance of property owned and leased by the firm, including routine repairs and maintenance including, but not limited to, electrical repairs, plumbing repairs, routine carpentry and structural repairs necessitated by average wear and use; excluded from the worker's services are routine lawn maintenance, snow removal, and large scale renovation projects, i.e. projects that exceed \$2,500; large scale renovation projects in excess of \$2,500 require a bid process, for which the worker may be eligible to submit a proposal; the firm initially agrees to pay for up to 30 hours per week, then increases to 40 hours per week, for work, labor, and services as called for in the agreement; any hours above the stated amount will need prior approval from either the Operational Manager or Executive Director; the worker agrees to work at least 48 weeks a year; the worker will submit an invoice to the firm biweekly for time and materials based on his hourly rate, along with an outline of projects, and their scope and timeline for completion; if any materials are bought utilizing the firm's accounts, all receipts must be submitted to the firm's finance director within 5 business days, not to exceed \$250 without prior written approval from the Operational Manager or Executive Director; each party reserves the right to withdraw from the agreement upon 30 days written notice to the other party; the agreement will be renewed automatically; the worker will obtain and maintain liability insurance for himself and his employees, and the firm will be additionally insured on said policy for the specified amount, with a copy to be provided to the firm.

Information from the parties supports that the firm relied upon the worker's prior training and experience to perform his services. The worker received his work assignments via maintenance work orders submitted by the staff. If problems or complaints occurred, the worker contacted the firm's Deputy Director. The worker was required to submit signed maintenance work orders upon completion. The worker's schedule was dependent upon the work required. He reviewed pending work orders, then determined his course of action for the day or week. The worker provided his services at the firm's community residences and administrative offices depending on need. The firm stated that the worker was not required to perform his services personally, and if additional personnel were needed, the worker would have been responsible for hiring and compensating them.

The firm provided the supplies required to complete repairs such as paint, wood, nails, plumbing fixtures, etc. The worker provided his own tools and transportation. The firm did not cover the worker under workers' compensation. Neither party indicated an investment by the worker in the firm or a related business, or the risk of the worker incurring an economic risk or financial loss beyond the normal loss of compensation.

The firm did not provide the worker with benefits, but made bonuses available to him. The firm 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. The worker terminated the work relationship without notice or incurring liability or penalty.

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.

Factors that illustrate whether there was a right to control how a worker performed a task include training and instructions. In this case, while the firm relied upon the worker's prior training and experience to perform his services, the firm was responsible for resolving any problems or complaints that may have occurred. It retained the right to change the worker's methods and to direct the worker to the extent necessary to protect its financial investment. Although the firm allowed the worker flexibility in his schedule, he was subsequently required to work 40 hours per week. If the worker must devote substantially full-time to the business of the person or persons for whom the services are performed, such person or persons have control over the amount of time the worker spends working and, therefore, the worker is restricted from doing other gainful work. The worker was required to submit bi-weekly reports stating time and materials used, based on his hourly rate, along with an outline of projects, their scope and timeline for completion. 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. 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 utilized his own tools. 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. Payment by the hour generally points to an employer-employee relationship. Although the firm required the worker to submit bids for projects over the stated amount, the worker provided services over multiple years and the amount reported to him each year is fairly consistent, showing his services did not vary in a significant manner. The firm required the worker to carry his own insurance, which only reduced his earnings; it did not put him in the posture of ever incurring a 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 maintenance services performed by the worker were a necessary and integral part of the function of the firm's business of providing community services and residential programs. 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. While the firm stated that the worker provided similar services for others during the same time period, 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 without incurring a penalty or liability. 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 for all services, and not an independent contractor operating a trade or business.