

SS-8 Determination—Determination for Public Inspection

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| 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

It is our usual practice in cases of this type to solicit information from both parties involved. Upon the submission of the Form SS-8 from the worker, we requested information from the firm concerning this work relationship. The firm responded to our request for completion of Form SS-8.

From the information provided the firm is in the business to manage residential properties and the worker was engaged under a written agreement to perform services as a caretaker. The worker's duties included routine maintenance at the firm's residential properties such as grounds keeping, lawn mowing, and shoveling snow as well as general building maintenance such as cleaning and providing building access, and assisting tenants with moving in and out. The firm believes the worker was an independent contractor (IC) while performing services for them because the worker signed an independent contractor agreement, he subcontracted the maintenance work to other workers, he was able to work as a maintenance worker for more than just one property management company, he controlled how and when he worked, and he was paid on Forms 1099-MISC. In the written agreement between the firm and the worker, the worker, as the caretaker, acknowledges that he is self-employed and performing the duties as an independent contractor who will be given a 1099 at the end of the taxable year.

The firm states they provided no training to the worker nor provided any instructions to him on how to do his work as outlined in the subcontractor agreement. The worker's assignments were listed in the Sub-Contractor agreement but if he wanted additional work, he contacted the company. The firm states that if they had extra tasks, they would contact the worker to see if he was interested in performing those services. The firm states the worker controlled how he or his subcontractors worked. If the worker had an issue while on the job site, the firm states the worker was to contact them. The worker was not required to submit reports to the firm or attend meetings. The firm states the worker kept his own schedule and hours and they did not exercise control over when he worked. The worker performed his services at the firm's properties. The firm states the worker hired and paid his own workers.

The firm states they provided some tools and cleaning supplies to the worker in order to perform his services. The firm states the worker provided tools, cleaning supplies and equipment, a lawn mower, and snow thrower. The firm states they reimbursed the worker if he purchased construction materials such as pipes, sheet rock, and mud and paint. The firm states it was not typical for the worker to make such construction purchases for reimbursement by them and they did not reimburse the worker for his other caretaking-related expenses such as tools, cleaning supplies, or equipment. The worker was compensated at an hourly rate plus monthly payments for being on-call. The firm states the worker had an opportunity to incur a loss as a result of his services due to the loss or damage to equipment and supplies. The firm states the worker agreed to the hourly wages and monthly payments in the Sub-Contractor agreement.

The firm states the worker performed similar services for others and it is unknown to them if the worker advertised his services. The firm states the worker was free to offer his services to the public. Tenants of the firm's buildings could contact the worker directly with a maintenance request or tenants could contact their property manager who would notify the worker of the maintenance request. Either party could terminate the work relationship at any time without either party incurring a liability.

Analysis

As in this case and 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 degree of importance of each factor varies depending on the occupation and the circumstances.

Evidence of control generally falls into three categories: behavioral control, financial control, and relationship of the parties, which are collectively referred to as the categories of evidence. In weighing the evidence, careful consideration has been given to the factors outlined below.

Factors that illustrate whether there is a right to control how a worker performs a task include training and instructions. In this case, the worker was experienced in this line of work and did not require training or detailed instructions from the firm. The need to direct and control a worker and his services should not be confused with the right to direct and control. The worker provided his services on behalf of and under the firm's business name rather than an entity of his own. The firm was responsible for the quality of the work performed by the worker and for the satisfaction of their clients. This gave the firm the right to direct and control the worker and his services in order to protect their financial investment, their business reputation, and their relationship with their clients.

While the firm provided the worker with freedom of action as to when he performed his services, this in and of itself does not determine the worker's status as an independent contractor. The whole relationship needed to be analyzed to determine the worker's correct employment tax status.

the worker provided his own hand tools, this is not considered a significant investment. 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 have a significant investment, and therefore, did not have the opportunity to realize a profit or incur a loss as a result of the services provided. 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. There was no evidence presented or found in this investigation that indicates the worker owned and operated his own business performing and offering those same services to the general public.

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.

If a worker performs more than de minimis services for a multiple of unrelated persons or firms at the same time, that factor generally indicates that the worker is an independent contractor. It is possible for a person to work for a number of people or firms concurrently due to financial need and the supporting of oneself and be an employee of one or all of whom engages him.

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, co-adventurer, 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.

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.