

SS-8 Determination—Determination for Public Inspection

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

Information provided indicated the firm provided technical consulting services. The worker had been retained in 2015 and 2016 as a maintenance person for the firm's property. The firm issued Form W-2 in 2015 and Form 1099-MISC in 2016. The firm indicated they felt he was an independent contractor in 2016 due to a change in the nature of his work. In 2015 he was doing routine recurring maintenance tasks that were under their supervision. In 2016 he was doing a number of different tasks including maintenance and new additions and construction. During that period he did not work under their direction, as they were actually traveling during much of that period and had no control or visibility into his work efforts. They provided him general descriptions of the desired goals, he then determined what to do and how to do it. The firm indicated he was performing similar services for others at the time also. His work schedule was flexible, determined by the task to complete. The firm indicated it provided the tractor/mower and some hand tools. The worker provided specialized construction and landscaping tools. The firm reimbursed for supplies purchased. The firm indicated he was paid on a lump sum. He would have been responsible for damage to the equipment or to his help. Either party could terminate the work relationship without incurring a penalty or liability. The firm indicated the jobs completed and there had been no additional work.

The worker indicated the vast majority of his work was to care for the firm's home and property. He made some upgrades, but mostly landscape care/tree work/ equipment maintenance. He was given general instructions about pool maintenance, where trees needed to be planted etc. Instructions given verbally. The worker indicated he generally worked from twelve to four or five on weekdays, Saturdays and Sundays might be 6-8 hours a day. He was to perform services personally. They provided all equipment and supplies. He was paid on salary, any expenses incurred were reimbursed, with receipts. He was let go, the owner's indicated they could no longer afford to keep him and was selling the property.

Analysis

The question of whether an individual is an independent contractor or an employee is one that is determined through consideration of the facts of a particular case along with the application of law and regulations for worker classification issues, known as “common law.” Common law flows chiefly from court decisions and is a major part of the justice system of the United States. Under the common law, the treatment of a worker as an independent contractor or an employee originates from the legal definitions developed in the law and it depends on the payer’s right to direct and control the worker in the performance of his or her duties. Section 3121(d)(2) of the Code provides that the term “employee” means any individual defined as an employee by using the usual common law rules.

Generally, the relationship of employer and employee exists when the person for whom the services are performed has the right to control and direct the individual who performs the services, not only as to what is to be done, but also how it is to be done. It is not necessary that the employer actually direct or control the individual, it is sufficient if he or she has the right to do so.

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. We must examine the relationship of the worker and the business. We consider 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. The degree of importance of each factor varies depending on the occupation and the context in which the services are performed.

Therefore, your 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.

We have applied the above law to the information submitted. 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 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, you retained the right to change the worker’s methods and to direct the worker to the extent necessary to protect your financial 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 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.

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 your business. Both parties retained the right to terminate the work relationship at any time without incurring a liability.

CONCLUSION

Based on the above analysis, we conclude that this is an erroneous misclassification of wages. The worker continued to perform the same services in 2016 as he had in 2015. The fact the work performed was not as strictly monitored, or the fact additional duties were given to him, does not negate the fact, 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. The firm continued to provide the equipment and supplies, or reimbursed the worker for the supplies purchased.