

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 worker submitted a request for a determination of worker status in regard to services performed for the firm as a janitor. The services performed included cleaning offices and restrooms, emptying trash, cleaning windows, cleaning parking lots of debris, ordering needed supplies, and miscellaneous tasks as requested by the firm's staff. The firm issued the worker Form 1099-MISC for 2016 through 2018. The worker filed Form SS-8 as he believes he erroneously received Form 1099-MISC.

The firm's response states it is a credit union providing financial services to individuals and small businesses. The worker performed after-business-hours janitorial services at two branch offices. The worker was classified as an independent contractor as he had full-time employment elsewhere; was not supervised nor controlled by any employee or supervisor; decided his own work schedule, what services needed to be performed at each office, and the sequence of performing those services; was not required to report services performed; services performed were not integral to the firm's financial business operations. The worker did not interact with the firm's members. The firm did not train the worker nor provide instruction. Benefits were not provided and the worker was paid on a monthly basis. The worker completed Form W-9, Request for Taxpayer Identification Number and Certification.

The firm stated it did not provide specific training or instruction to the worker. Services consisted of cleaning the wastebaskets nightly, mopping floors, and vacuuming carpets as the worker deemed necessary. The worker determined the methods by which assignments were performed. If problems or complaints arose, the firm's senior management was contacted and assumed responsibility for resolution. Reports and meetings were not required. The worker had no set schedule or hours. The worker determined his own start time and the days he would provide services. The worker spent equal time at each branch office. The firm did not require the worker to personally perform services. The worker had the ability to determine if helpers were needed, subject to the firm's approval as the CEO needed to be aware of individuals entering the building. The worker asked to bring a helper; however, he never did. The worker stated the firm instructed him to clean, secure the building upon exiting, and to perform special assignments as required. The firm provided work assignments and determined the methods by which assignments were performed. He performed services on a regularly scheduled basis, i.e. Monday through Friday, 5 to 9 pm. The firm required he personally perform services.

The firm stated it provided cleaning equipment and supplies. The worker did not lease equipment, space, or a facility. The worker did not incur expenses in the performance of services for the firm. Customers paid the firm. The firm paid the worker a mutually agreed upon monthly fee; a drawing account for advances was not allowed. The firm did not carry workers' compensation insurance on the worker. The worker did not incur economic loss or financial risk as he had a separate full-time job. The worker established the level of payment for the services provided. The worker stated the firm also provided facility keys and security alarm codes. The firm paid him salary. He did not establish the level of payment for the services provided.

The firm stated benefits were not provided to the worker. The work relationship could be terminated by either party without incurring liability or penalty. The worker did perform similar services for others; the firm's approval was not required for him to do so. There was no agreement prohibiting competition between the parties. The worker did not advertise. The firm did not represent the worker to its members as services were performed after-hours. The worker terminated the work relationship. The worker stated the benefits of paid vacation time and bonuses were made available to him. He did not perform similar services for others. The firm represented him as its janitor to its customers.

Analysis

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.

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, a statement that a worker is an independent contractor pursuant to a written or verbal 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. Furthermore, whether there is an employment relationship is a question of fact and not subject to negotiation between the parties.

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. In this specific case, the documented work relationship dates back to 2008, possibly earlier. Furthermore, the janitorial services performed by the worker were integral to the firm's cleaning needs. The firm established its cleaning needs and assumed responsibility for problem resolution. These facts evidence the firm retained the right to direct and control the worker to the extent necessary to ensure satisfactory job performance in a manner acceptable to the firm. Based on the worker's work experience and work ethic the firm may not have needed to frequently exercise its right to direct and control the worker; however, the facts evidence the firm retained the right to do so if needed.

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. Also, workers are assumed to be employees if they are guaranteed a minimum salary or are given a drawing account of a specified amount that need not be repaid when it exceeds earnings. In this case, as acknowledged by the firm, the worker did not invest capital or assume business risks. 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 also acknowledged the worker did not incur economic loss or financial risk. Based on the fixed monthly rate of pay arrangement the worker could not realize a profit or incur a loss.

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. Both parties retained the right to terminate the work relationship at any time without incurring a liability. There is no evidence to suggest the worker performed similar services for others as an independent contractor or advertised business services to the general public during the term of this work relationship. The classification of a worker as an independent contractor should not be based primarily on the fact that a worker's services may be used on a temporary, part-time, or as-needed basis. As noted above, common law factors are considered when examining the worker classification issue.

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.

The firm can obtain additional information related to worker classification online at www.irs.gov; Publication 4341.