

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

The worker initiated the request for a determination of his work status as a maintenance superintendent in tax years 2011 through 2017, for which he received Form 1099-MISC. In this position he performed all property maintenances and repairs throughout the development in all common areas as well as privately-owned units. He worked exclusively and full-time for the firm and its owners. The firm's business is described as real estate owner, developer, builder, and operator of the development.

The firm's response was signed by a member/manager. The firm's business is construction of town home units for sale. The worker provided maintenance services – cleanup and handy man labor around the construction project.

The worker stated he was not given training and instructions; however, the firm gave him daily direction on what work to perform and he was directed to supervise the outside contractors that performed more specialized tasks. The daily list or at least every-other-day tasks were conveyed in face-to-face communications and the smaller job assignments were self-directed. The firm determined the methods by which the worker's services were performed; and, any problems or complaints encountered by the worker were directed to the firm for resolution. The worker's services were rendered on the firm's premises every weekday and was told that his "regular hours" were to be 8am to 5pm; and, he was also "on-call" to respond to any maintenance issues on evenings and weekends. The worker was required to perform the services personally; any additional personnel were hired and paid by the firm.

The firm responded that no specific training and instructions were given. The worker's job assignments were performed independently with his own or the firm's tools and supplies. The worker determined the methods by which he performed the services. Any problems or complaints encountered by the worker were directed to the firm's owner/member manager for resolution. The worker's services were rendered on-site and the common areas. The worker was not required to perform the services personally; any additional personnel were hired and paid by the worker.

The worker indicated the firm provided and/or paid for all supplies, equipment, materials. The worker furnished nothing and was reimbursed for any supplies needed. The worker did not lease equipment, space, or a facility. The firm paid the worker an hourly wage. The customers paid the firm. The worker was not covered under the firm's workers' compensation insurance policy. The worker responded he was not at risk for a financial loss in this work relationship. The firm established the level of payment for services provided with annual pay raises throughout the years.

The firm's response was that the worker did not lease equipment, space, or a facility; but, the worker incurred expenses for supplies and small tools. The worker was paid per the submitted invoices. The customers paid the firm. The worker was not covered under the firm's workers' compensation insurance policy. The firm indicated the worker established level of payment for services provided.

Both parties acknowledged there were no benefits extended to the worker, that either party could terminate the work relationship without incurring a liability or penalty, and that the worker was performing same or similar services for others during the same time frame. The worker noted he was doing maintenance work for a company that managed the property where he resided. The worker was referred to as the 'Maintenance Superintendent' in communications with owners, residents, subcontractors, and all other relevant parties. The worker stated he quit; and, the firm indicated all units were sold and work relationship ceased.

Analysis

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.

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.

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.

The fact that the person or persons for whom the services are performed furnish significant tools, materials, and other equipment tends to show the existence of an employer-employee relationship.

Lack of significant investment by a person in facilities or equipment used in performing services for another indicates dependence on the employer and, accordingly, the existence of an employer-employee relationship. 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. Also, if the firm has the right to control the equipment, it is unlikely the worker had an investment in facilities.

A person who can realize a profit or suffer a loss as a result of his or her services is generally an independent contractor, while the person who cannot is an employee. "Profit or loss" implies the use of capital by a person in an independent business of his or her own. The risk that a worker will not receive payment for his or her services, however, is common to both independent contractors and employees and, thus, does not constitute a sufficient economic risk to support treatment as an independent contractor. If a worker loses payment from the firm's customer for poor work, the firm shares the risk of such loss. Control of the firm over the worker would be necessary in order to reduce the risk of financial loss to the firm. The opportunity for higher earnings or of gain or loss from a commission arrangement is not considered profit or loss.

We have considered the information provided by both parties to this work relationship. 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 and business reputation and to ensure its customers' satisfaction and that its contractual obligations were met. The worker was not operating a separate and distinct business; 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. 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. 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.

CONCLUSION

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.

Please see www.irs.gov for more information including Publication 4341 Information Guide for Employers Filing Form 941 or Form 944 Frequently Asked Questions about the Reclassification of Workers as Employees and Publication 15 (Circular E) Employer's Tax Guide.