

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 from January 2015 to December 2016 as a mechanic. The firm issued the worker Form 1099-MISC for 2015 and 2016. The worker filed Form SS-8 as they believe they received Form 1099-MISC in error. The worker believes they should have been classified as an employee because the firm set the hours of work, determined the work to be completed, paid the worker and hourly wage, and collected payments from customers. There was no written agreement between the parties. The worker provided a letter from their CPA regarding behavioral and financial control the firm had over the worker.

The firm's response states it provides auto repair. The work provided by the worker was sub-contracted auto repair and painting. The worker was requested to perform repairs and painting on customer vehicles. The firm did not provide supervision or direction. The firm states that the worker set their own hours, provided tools for the jobs performed, and worked for other firms.

The firm states that they provided the worker with no instruction or training on job assignments. The worker received job assignments on an as needed basis. The firm states that the worker was issued jobs when they showed up to work at the firm's premises, and if they were unavailable the work went to other contractors. The firm states that the worker performed services according to the worker's knowledge and skills and was responsible for problem resolution. The worker was required to verify with the firm that work was completed yet no actual documents were required of the worker. The worker had access to the firm's shop location during the firm's hours of operation but the worker did not have a set schedule. The worker performed all services at the firm's shop premises with their tools. The worker was not required to attend any meetings but they were required to perform all services personally. The worker would be responsible for hiring and paying any helpers needed and would require approval from the firm prior to doing so. The worker states that the firm's owner provided instruction on the work that needed to be performed based upon an agreement between the customer and the firm. The firm's owner assigned job tasks to the worker after scheduling work to be done with customers. The firm owner determined what work would be done on the vehicles by the worker as well as when the work should be performed. If problems or complaints would arise during job duties, the worker was required to contact the firm's owner for problem resolution. The worker was required to verbally report on work performed on vehicles to the firm owner, who would then inspect the work. The worker performed services from 8a.m. until 5p.m. with a one-hour lunch break. Sometimes the firm's owner would ask the worker to pick up parts or supplies for job assignments. The worker performed services solely at the firm's premises. The worker was required to perform all services personally and the firm was responsible for hiring and paying any assistants needed.

The firm states that they provided the shop and materials for the jobs done, and the worker provided tools and some materials. The firm is unaware of any lease responsibilities that the worker may have had. The worker incurred expenses of tools and materials during the job duties and the firm did not reimburse the worker. The worker was paid on a job completion basis and was not allowed access to a drawing account for advances. The firm states that customers paid the firm and they did not carry worker's compensation insurance on the worker. The worker faced the possibility of loss or damage to tools or materials, or time if corrections to jobs performed were necessary. The firm set the fees for all work performed for their clients. The worker states that the firm provided auto parts, fluids and oils, tires, vehicle lifts, and other diagnostic tools and equipment. The worker provided some personal tools that were removed when the work relationship ended. The worker did not lease space, facilities, or equipment. The firm owner paid for all job-related expenses for vehicles upon which work was performed. The worker was paid a salary on a weekly basis. Customers would pay the firm. The worker did not have any exposure to economic loss or financial risk and did not set the level of payment for services provided.

The firm did not provide any benefits to the worker. The relationship between the parties could be terminated at any time without incurring loss or liability. The firm states that the worker provided similar services to other firms. There were no agreements prohibiting competition between the firm and the worker. The worker was not a member of a union. The worker was represented by the firm as a subcontractor. The work relationship ended when the worker quit showing up for work at the firm's premises. The worker states that they did not perform similar services for any other firm while working for the firm. The worker states that they did not advertise their services to the public. The worker states that customers were under the impression that the worker was an employee of the firm. The work relationship ended when the worker quit.

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.

If the services must be rendered personally, presumably the person or persons for whom the services are performed are interested in the methods used to accomplish the work as well as in the results. In this case, the firm required the worker to personally perform services. Furthermore, the services performed by the worker were integral to the firm's business operation of auto body repair. The firm provided work assignments by virtue of the customers served, required the worker to report on services performed, 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 education, past 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, day, 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, 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 provided the premises as well as equipment for the job responsibilities of the worker. The worker did not have any major expenses or economic risk exposure during this work relationship. Based on the hourly 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, 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. 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.