

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 submitted a request for a determination of worker status in regard to services performed for the firm from March 2017 to April 2018 as a house cleaner. The services performed included cleaning bathrooms, kitchens, living rooms, bedrooms, hallways, windows, curtains, and blinds. The firm issued the worker Form 1099-MISC for 2017 and 2018. The worker filed Form SS-8 as she believes she is the definition of an employee. An independent contractor agreement was provided for our review.

The firm's response states it's a house cleaning services business. The independent contractor agreement states, in part, job duties included dusting, cleaning, vacuuming, sanitizing, spot cleaning, etc. The worker was classified as an independent contractor as she provided her own transportation, supplies and equipment.

The firm stated it provided personal training to complete and understand job responsibilities. The contract provided for a varying job schedule and determined the methods by which assignments were performed. The firm was contacted if problems or complaints arose. The firm assumed responsibility for problem resolution. Invoices were required. A copy provided by the firm documented the hours worked, the hourly rate of pay, and deductions for cleaning supplies and use of the firm's vacuum. The worker cleaned two homes per day; her schedule varied as homes had different time requirements. Services were performed at customer locations. Meetings were not applicable. The firm required the worker to personally perform services. The worker stated training was for a period of two-weeks. The firm provided work assignments and determined the methods by which the assignments were performed. Her daily routine included picking up supplies from the firm each morning, riding with the firm's supervisor to customers' homes, and returning supplies and equipment back to the firm at the end of each workday. The firm was responsible for hiring and paying substitutes or helpers.

The firm did not provide any equipment. The worker had to provide her own supplies and equipment. The worker did not lease equipment, space, or a facility. The worker incurred expenses for her auto, cleaning supplies, and equipment. The firm did not reimburse the worker for expenses. Customers paid the firm. The firm paid the worker an hourly rate of pay; 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. The firm established the level of payment for the services provided. The worker stated the firm provided the property, window cleaners, vacuum, rags, brushes and detergents. She did not incur expenses in the performance of services for the firm.

The firm stated benefits were not applicable. The work relationship could be terminated by either party without incurring liability or penalty. It is unknown if the worker performed similar services for others. An agreement prohibiting competition between the parties was not applicable. The worker advertising was not applicable. The firm represented the worker as a contractor to its customers. Services were billed under the firm's business name. The work relationship ended when the worker said she hadn't felt well and never returned. The worker stated she did not perform similar services. She was unsure how the firm represented her to its customers. The firm ended the work relationship.

The independent contractor agreement states, in part, the firm required the worker to use the same cleaning supplies that it uses; therefore, it could provide them to the worker at or below the firm's cost. The firm required the worker to be dependable and to start on time. Duties were to be performed with consistency and quality. Failure to conform to the firm's requirements would be cause to terminate the contract.

The worker was not responsible for soliciting new customers. The firm determined the worker's territory. Orders were submitted to and subject to the firm's approval.

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, the firm's statement that the worker was an independent contractor pursuant to a written 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.

Training a worker by requiring an experienced employee to work with the worker, by corresponding with the worker, by requiring the worker to attend meetings, or by using other methods, indicates that the person or persons for whom the services are performed want the services performed in a particular method or manner. This is true even if the training was only given once at the beginning of the work relationship. In this case, the firm trained the worker to ensure she completed services according to its quality standards. Furthermore, the services performed by the worker were integral to the firm's business operation. The firm provided assignments by virtue of the customers served, required the worker to invoice for 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 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. As acknowledged by the firm, the worker did not incur economic loss or financial risk. Based on the hourly rate of pay 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.