

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 May 2017 to June 2017. The services performed included repairs and service on vehicles acquired by the firm. The firm issued the worker Form 1099-MISC for 2017; however, he never received a copy of it. The worker believes he received Form 1099-MISC in error.

The firm's response states its business is auto sales and service. The worker was engaged as a mechanic. The worker was classified as an independent contractor as he used his own software to determine time and costs associated with each job, then billed the firm; he only worked when there was service to be done on vehicles; he brought his own tools to the firm's shop; he provided a copy of his [REDACTED] profile which documented he had been running his own shop since 2012. A written agreement between the firm and worker was not applicable.

The firm stated it did not provide the worker specific training or instruction. When the firm had vehicles that needed to be serviced, it called the worker. The worker could accept or decline work. The worker determined the methods by which assignments were performed. If problems or complaints arose, the firm was contacted and assumed responsibility for resolution. Reports included estimates, repair orders, and invoices for services performed. The worker had no set routine or schedule. He came in when vehicles needed servicing. Services were performed at the firm's premises. Meetings were not required. The firm required the worker to personally perform services. Substitutes or helpers were not applicable. The worker stated he worked under supervision of the firm's general manager. He repaired and serviced vehicles to ready them for sale and to pass state inspection requirements. Work was delegated by the firm's general manager, who determined the methods by which assignments were performed. All vehicle repair orders were logged into the firm's automotive-based shop management program. He performed services on a regularly scheduled basis; Monday through Friday from 8 am to 6 pm, with some occasional Saturdays. The firm required he attend occasional morning meetings to discuss vehicles to be worked on that day. The firm was responsible for hiring and paying substitutes or helpers.

The firm stated it provided the location and vehicles needing service. The worker provided software, parts, and tools. The worker did not lease equipment, space, or a facility. The worker incurred the unreimbursed expense associated with small tools and uniforms. Customers paid the firm. The firm paid the worker piece work; a drawing account for advances was not allowed. The firm's payment transaction report documents it paid the worker on a regular, weekly basis. The firm did not carry worker's compensation insurance on the worker. The worker's economic loss or financial risk related to broken or damaged tools. The worker established the level of payment for the services provided. The worker stated the firm also provided automotive lifts, equipment, parts, supplies, and the state inspection station. He provided general automotive tools. He did not incur expenses in the performance of services for the firm. The firm paid him an hourly rate of pay. The firm established the level of payment for the services provided.

The firm stated benefits were not applicable. The work relationship could be terminated by either party without incurring liability or penalty. The worker performed 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 was able to work at his own location whenever required. The firm represented the worker as a contractor to its customers. Services were performed under the worker's own business. The work relationship ended as the quality of work was not up to the firm's standards. The worker stated he did not advertise. The firm represented him as an employee to its customers. Services were performed under the firm's business name. The work relationship ended when he gave a one-week notice and 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 mechanical services performed by the worker were integral to the firm's business operation. The firm provided work assignments by virtue of its business, collected payment from customers, 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.

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. 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. Based on the piece work or 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 document the worker independently performed similar services 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.