

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 2010 to December 2019 as a cleaner. The firm issued the worker Form 1099-MISC for 2019. The worker filed Form SS-8 as they believe they received Form 1099-MISC in error since the firm owner directed and controlled the worker, provided all supplies and equipment needed, required the worker to wear a company uniform, and told the worker when to complete the job. There was no written agreement between the parties.

The firm's response states it is a residential and commercial cleaning company. The work provided by the worker was cleaning. The worker was requested to perform cleaning functions for interior residential and commercial properties. The firm believes the worker was an independent contractor because the worker was on call. The firm provided the worker with a 1099-MISC in 2019 but issued the worker a W-2 in 2020.

The firm states that they would go over with the worker what needed to be done at each job. The worker received job assignments either verbally from the firm or through text. The firm owner was responsible for problem resolution should the worker encounter any problems or complaints during their job duties. The worker was not required to provide the firm with any reports. The worker would provide services on an as-needed basis, and each job would last between 3 and 4 hours. All work was performed at customer locations. There were no meetings require for the worker to attend. The worker was required by the firm to provide all services personally. The firm states that the worker would sometimes bring her own help. If additional help was needed, sometimes the firm would hire them and sometimes the worker would hire them. The worker states that the firm's owner would demonstrate to the worker how to use the equipment and supplies the firm provided. The firm owner would supervise the worker and would also instruct on areas of each customer location to clean. The worker was provided with a schedule either verbally or through text message which included customer address and date cleaning was needed. The owner of the firm determined the methods used to complete job tasks as well as assumed responsibility for problem resolution. The worker was required to provide the firm with a verbal report of completed tasks at each customer location. A task list was provided by the firm owner through text message if the firm owner was unable to remain for the duration of the job duties. The worker was required to arrive on time at customer locations and await further instruction from the firm owner. When the company van would arrive, the worker would unload supplies and equipment to be used. The worker performed services 85% of the time at customer locations and 15% of the time in the vicinity of the company van. The worker attended a networking meeting with the firm owner but there were no penalties for not attending. The worker was required to perform services personally. The firm owner was responsible for hiring and paying additional help needed.

The firm states that they provided the worker with cleaning supplies, vacuums, blowers, a steam mop, etc. The worker provided a cleaning supplies, a vacuum, mops, and various other supplies. The worker did not have to lease any space, facilities, or equipment. The worker did not incur any expenses. The worker was paid an hourly wage. Sometimes the firm would pay the worker in one lump sum for services performed. Customers would pay the firm. The firm did not carry worker's compensation insurance on the worker. The worker faced no economic loss or financial risk. The firm states that the firm set the level of payment for services rendered. The worker states that the firm provided uniforms, snacks, beverages, all cleaning supplies, and all cleaning equipment needed. The worker did not provide anything. Customers might on occasion provide additional cleaning supplies they desired to be used. The worker's expenses were related to meals, drinks, music streaming services for use while they worked, and audio equipment expenses to be used while they worked. The worker's personal travel expenses were reimbursed on some occasions by the firm. The worker was paid an hourly wage with no access to a drawing account for advances. Customers would pay the firm. The owner of the firm was held liable for any damages incurred by the worker. The firm's owner set the level of payment for services rendered.

The firm states that they did not provide benefits to the worker. The relationship between the parties could be terminated by either party without liability or penalty. The worker did not perform similar services for other firms during the work relationship. The worker was not a member of a union. The worker did not advertise their services to the public. The firm states that they represented the worker as an employee providing services under the firm's name. The worker states that the firm provided them with bonuses. The worker was required to direct any new clients to the firm instead of working directly for clients. The worker states that they were represented by the firm owner as an employee of the firm. The work relationship was ongoing upon receipt of the form SS-8 determination request.

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 cleaning services. 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. 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.