

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 initiated the request for a determination of his work status as a maintenance man for wood-fired hot water boilers, repair of heating system, and the repair of refrigeration equipment, laundry equipment, maintenance of restaurant equipment, electrical controls, etc. in tax years 2017 and 2018. He was originally hired at an hourly rate for one job installing wood-fired boilers. He was then tasked with numerous other maintenance functions throughout the company's properties at the same hourly rate. He continued to work as directed by maintenance supervisor until the firm failed to pay him; he was not issued Form W-2 or Form 1099-MISC. The worker noted that he had retired in 2015 and was no longer in business as a private contractor. The firm's business is described as hotel, gift shop, apartments, and housing rental.

The firm's response was signed by the General Manager. The firm's business is hospitality, restaurant, and housing. The worker provided assistance with maintenance projects, boiler work, and water system work. He worked on boiler projects periodically and provided the firm with an invoice.

The worker stated he was assigned to certain tasks/job assignments and given verbal instructions from the head of maintenance or the local manager. Generally, it was the worker that determined the methods by which the services were performed due to his vast experience. Any problems or complaints encountered by the worker were directed to the firm's head of maintenance for resolution. The services were rendered on a part-time basis and the schedule was left up to worker unless something required immediate attention. All services were rendered on the firm's properties. The worker was required to perform the services personally; any additional personnel were hired and paid by the firm.

According to the firm, there was no specific training and instructions given to the worker. The firm requested the worker's assistance with periodic projects; and, it was the worker that determined the methods by which he performed the work. Any problems or complaints encountered by the worker were directed to the firm's general manager for resolution; the worker was responsible for his own work. The worker was hired for projects that had a beginning and an end. The worker sent invoices to the general manager for the parts and the labor services rendered; mostly maintenance/boiler-related projects at the the firm's property. The worker was required to perform the services personally; if substitutes or helpers were needed the firm would go with another contractor. The worker was free to hire his own helpers as it was his own business; however, the firm had maintenance employees that could assist, if needed for heavy lifting, etc.. If the worker hired helpers, he would have included that in the cost of the invoice he submitted when the project was complete.

The worker indicated the firm provided all parts, materials, and supplies required for repairs or new construction. The worker furnished all hand and power tools needed for repairs, construction, and/or assembly. The worker did not lease equipment, space, or a facility. The worker was reimbursed for parts and materials purchased and was reimbursed, adding there was no profit mark-up of the cost. The worker was paid an hourly wage. Customers paid the firm. The worker was not covered under the firm's workers' compensation insurance policy. The worker stated his risk for a financial loss in this work relationship would be due to possible expenses from possible injury on the job or breakage or theft of his personal tools. The worker stated that he informed the firm of the desired hourly wage to be paid and the firm agreed.

The firm responded that the worker was reimbursed for the Parts and Pay Invoices from the worker, and provided the worker with some tools. The worker also furnished some tools. The worker did not lease equipment, space, or a facility. The firm paid the invoices presented by the worker for certain maintenance projects. The customers paid the firm. The worker was not covered under the firm's workers' compensation insurance policy. The firm indicated the worker was at risk for a financial loss in this work relationship, as he could be subject to lawsuit for damages due to faulty work or use of equipment. The worker did establish the level of payment for services provided.

The firm and worker acknowledge there were no benefits extended to the worker and that either party could terminate the work relationship without incurring a liability or penalty. The worker stated he was not performing same or similar services for others during the same time frame. The worker stated he quit, as firm failed to pay for work already performed. The firm indicated the contractor completed the projects he was contracted to do and the firm no longer required or asked for further services.

The worker provided a copy of the report for the services rendered which was specific to the date, location and task, and hours worked.

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.

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.

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.

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. 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.