

SS-8 Determination—Determination for Public Inspection

Occupation

03PMW.46 RepairMaintenanceWkr

Determination:

☒ Employee☐ Contractor

UILC

Third Party Communication:

☒ None☐ Yes**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 2013 as a maintenance worker. The work done was repairs and maintenance of various properties. The firm issued the worker Form 1099-MISC for the years in question. The worker filed Form SS-8 as he never worked on the outside and was treated by the firm as an employee. The Department of Labor determined the worker was an employee and not a subcontractor.

The firm's response stated it is a non-profit entity providing affordable housing to low-income elderly persons. The worker performed general routine maintenance. The firm believes the worker was an independent contractor as he performed services for others, set his own hours, and was not supervised, provided instruction or tools, or trained to complete assignments that were infrequent. There was no written agreement between the parties.

The firm stated it did not provide specific training or instruction the worker. The firm contacted the worker to determine his availability. If available, maintenance tasks were assigned according to the type of service required. The worker determined the methods by which assignments were performed. The firm was contacted and responsible for problem and complaint resolution. The firm required the worker to provide a schedule of hours worked to perform assignments. Meetings were not required. The worker did not have a daily routine as his services were periodically requested and based on his availability. If accepting a work assignment, the worker established his own schedule. Services were performed at the firm's housing complex. The firm required the worker to personally perform services. Hiring and paying substitutes or helpers was not applicable. The worker stated the firm provided him daily tasks to complete. The firm determined the methods by which assignments were performed. Time sheets identified the account (property) serviced, date, type of service rendered, hours worked, and total labor (based on an hourly rate of pay). The worker's routine consisted of arriving at 8 am, obtaining work assignments for the day, taking his lunch break when told, and working until 2:30 pm. The firm was responsible for hiring and paying substitutes or helpers.

The firm stated it provided supplies. The worker provided equipment, tools, and supplies. The worker did not lease equipment, space, or a facility. The worker incurred the unreimbursed expenses of travel and incidental tools. The firm reimbursed for supplies if incurred by the worker. The firm paid the worker time and materials, if any. The worker was not allowed a drawing account for advances. The firm did not carry workers' compensation insurance on the worker. The worker's economic loss or financial risk related to the possibility of having to correct services without additional compensation. The firm established the level of payment for the services provided. The worker stated the firm provided all supplies and materials. The worker did not incur expenses in performing services for the firm. Customers paid the firm. The worker did not incur economic loss or financial risk.

The work relationship could be terminated by either party without incurring liability or penalty. The firm stated the worker did perform similar services for others during the time period in question. The firm's approval was not required for the worker to have done so. There was no agreement prohibiting competition between the parties. The worker was not a member of a union. It is unknown if the worker advertised. The firm did not represent the worker to its tenants. The worker used his business name in performing services. The work relationship ended when the worker accepted a job with another company. The worker stated the benefit of bonuses was made available to him. He did not perform similar services for the general public or advertise. The firm represented him as its maintenance worker.

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.

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 maintenance services performed by the worker were integral to the firm's housing complex as evidenced by the long-term work relationship. Based on the worker's prior work experience the firm may not have frequently exercised its right to direct and control the worker; however, as the firm was contacted and responsible for problem and complaint resolution, these facts evidence the firm ultimately retained the right to direct and control the worker, if needed, to ensure satisfactory job performance in a manner acceptable to the firm.

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. 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 the general public as an independent contractor or advertised business services 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.