

SS-8 Determination—Determination for Public Inspection

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| Occupation 03PMW.130 RepairMaintenanceWkr | Determination: <input checked="" type="checkbox"/> Employee <input type="checkbox"/> Contractor |
| UILC | Third Party Communication: <input checked="" type="checkbox"/> None <input type="checkbox"/> Yes |

Facts of Case

The worker submitted a request for a determination of worker status in regard to services performed for the payer from February 2014 to October 2015 as an office cleaner. The work done by the worker included cleaning two offices. The payer issued the worker Form 1099-MISC for the years in question. The worker filed Form SS-8 as he believes he erroneously received Form 1099-MISC. The worker originally performed cleaning services for another business owner and he received Form W-2. When continuing to perform the same services for the payer, taxes were not originally withheld funds and Form 1099-MISC was issued. The worker then requested taxes be withheld. The payer did withhold taxes for a period of time but funds were never remitted to the Service. The payer ultimately returned to the worker taxes it had withheld.

The payer's response stated it is a janitorial services business. The worker was engaged as a contractor to clean, mop, sweep, and vacuum. The payer retained the worker when it won the cleaning contract as the worker had been cleaning for the prior contract holder. The worker agreed to contract the cleaning from the payer for a fixed monthly rate of pay.

The payer stated the worker was already cleaning and continued to do the same job when the payer got the contract. The worker determined the methods by which assignments were performed. The payer was contacted if problems or complaints arose. The payer was responsible for resolution. Reports and meetings were not required. The worker's routine was unknown as the worker cleaned when the customer's office was closed. Services were performed only at one location. The worker was not required to personally perform services. The worker stated that even though he had performed for the prior contract holder, the payer gave him specific instructions and supervised the work done. Services were performed on a regular, recurring basis. The payer determined the methods by which assignments were performed. The payer required him to personally perform services.

The payer stated it provided paper goods and cleaning supplies. The worker did not lease equipment, space, or a facility. The worker incurred the unreimbursed expense of gas. Customers paid the payer. The payer paid the worker a lump sum. The payer did not carry workers' compensation insurance on the worker. The worker did not incur economic loss or financial risk. The worker established the level of payment for the services provided. The worker stated the payer also provided the vacuum and bags, brooms, gloves, etc. The payer initially paid him an hourly rate of pay which was later changed to salary. The payer established the level of payment.

The work relationship could be terminated by either party without incurring liability or penalty. The payer stated it is unknown if the worker performed similar services for others. There was no agreement prohibiting competition between the parties. The payer represented the worker as a contractor to its customers. The work relationship ended when the worker was terminated. The worker stated the payer once provided a Christmas gift. He did not perform similar services for others or advertise. Services were performed under the payer's business name.

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 payer's statement that the worker was an independent contractor pursuant to a 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.

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 cleaning services performed by the worker were integral to the payer's business operation. The payer provided work assignments by virtue of the customer served, assumed responsibility for problem resolution, and collected customer payment for services performed. These facts evidence the payer retained the right to direct and control the worker to the extent necessary to ensure satisfactory job performance in a manner acceptable to the payer. Based on the worker's past work experience and work ethic the payer may not have needed to frequently exercise its right to direct and control the worker; however, the facts evidence the payer retained the right to do so if needed.

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 payer 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 payer 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. As acknowledged by the payer, the worker did not incur economic loss or financial risk. Based on the monthly 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 payer'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 payer 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 payer can obtain additional information related to worker classification online at www.irs.gov; Publication 4341.