

SS-8 Determination—Determination for Public Inspection

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| Occupation 03PMW.146 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 April 2008 to November 2014 as a window washer. The worker also did some outside cleaning. 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 asked the payer for Form W-2 because taxes had been withheld from his earnings. The worker believes he was an employee as the business was not his and the payer treated him as an employee. Customers called and paid the payer. The payer assigned work to the worker.

The payer's response stated it is a seasonal (and as weather permits) residential and commercial window washing business. The worker was engaged as a window washer. The work done by the worker included cleaning windows, sashes, sills, and screens (interior and exterior). The worker performed services on a part-time and seasonal basis. The worker was classified as an independent contractor as he was free to perform similar services for himself and others. The worker set his own work schedule and he was never told how to work. The worker could hire (and pay), without the payer's permission, a substitute. The worker was paid on a per job basis, he did not receive benefits, and he was responsible for his own insurance and taxes. There was no written agreement between the parties.

The payer stated it did not provide specific training or instruction to the worker. The worker was expected to use his own experience to perform services. Work assignments were available from the payer. The worker was free to choose a job. The worker determined the methods by which assignments were performed. Customer relationships are maintained by the payer; therefore, it was contacted and assumed responsibility if problems or complaints arose. Reports and meetings were not required. The worker set his own hours to arrive at the customer site in order to perform services. Services were performed at customer locations. The payer did not require the worker to personally perform services. The worker was responsible for hiring and paying substitutes or helpers. The worker stated the payer's foreman gave him instructions related to the work location and which windows to wash. The foreman assigned work tasks, determined the methods by which services were performed, and assumed responsibility for problem resolution. The worker was required to report any accidental property damage to the foreman. The worker's daily routine consisted of reporting to the foreman's home at 7 am, traveling to the job site with the foreman in his van, and working until 4 pm. The foreman returned the worker to his home. The payer required the worker to personally perform services. The foreman was responsible for hiring substitutes or helpers. The payer paid them.

The payer stated the worker provided and incurred the unreimbursed expenses associated with his vehicle, insurance, ladders, buckets, squeegees, towels, cleaning solution, and brushes. The worker did not lease equipment, space, or a facility. Customers paid the payer. The payer paid the worker on a per job basis; a drawing account for advances was not allowed. The payer did not carry workers' compensation insurance on the worker. The worker risked the loss of business opportunities due to weather, in addition to loss or damage of equipment and materials. The payer establishes payment from customers. The worker established his fee per job. The worker stated he did not provide supplies, equipment, or materials. He was not licensed or insured in connection with services performed. He does not have a business tax identification number. The worker incurred the unreimbursed expense of boots, work clothes, and his cell phone. The payer paid him a daily rate of pay. He did not incur economic loss or financial risk. The payer established the level of payment for the services provided.

The payer stated benefits were not made available to the worker. The relationship could be terminated by either party without incurring liability or penalty. The worker did perform similar services for others. The payer's approval was not required for the worker to do so. There was no agreement prohibiting competition between the parties. It is unknown if the worker advertised. The payer represented the worker as a contractor to its customers. Services were performed under the payer's business name. The work relationship ended when the worker stopped showing up. The worker stated the payer provided him the benefit of paid medical costs when injured on the job. The worker did not perform similar services for others or advertise. The payer represented him as an employee to its customers. The work relationship ended when the worker complained to the payer that his check was not his complete pay. The payer told him he could leave whenever he wanted.

Attempts were made to obtain additional information from the payer; however, phone messages left on the payer's business answering services were not returned.

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 negotiations 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 services performed by the worker were integral to the payer's business operation. The payer provided work assignments by virtue of the customers served and it maintained customer relationships including problem or complaint resolution and pricing. 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, 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 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, there is no evidence of the worker investing capital or assuming 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 per job or daily 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.