

SS-8 Determination—Determination for Public Inspection

Occupation

Construction/Technical Services/Trades

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 is seeking a determination for worker classification for services performed as an infrared thermographer for the firm from April 2014 until December 2019. The worker received a 1099-MISC from the firm for all years they performed services for the firm. The worker states that they were misclassified by the firm as an independent contractor because the firm had control over the worker's performance, the firm provided the tools, procedures, and clients, and the firm paid the worker on a weekly basis. There were no written agreements between the parties.

The firm states that they provide infrared imaging services for mechanical and electrical inspections of building equipment. The worker was requested to provide services performing infrared inspections. The firm classified the worker as an independent contractor to meet the needs of customers. The firm provided a letter to the worker explaining the 1099-status and a 1099-detail vendor report including payments to the worker.

The firm states that they provided the worker with Level 1 thermographer training and certification. Jobs were scheduled with customers and then emailed to the worker to complete. The firm's office manager determined the methods by which job assignments were performed. If the worker encountered any problems or complaints, they were required to contact the office manager for problem resolution. The worker would take digital infrared images and submit them to the firm for final processing. The worker's hours were flexible and not always full-time. The worker performed services at various customer locations. The worker was required to participate in online trainings, with no penalties for not attending. The firm required the worker to personally perform services. Helpers and substitutes were not applicable. The worker states that the firm offered the worker paid training in order for the worker to be able to perform service for the firm. The worker received job assignments directly from the firm on a weekly basis to be completed in person. Reports were completed and findings were sent to the firm to be relayed back to clients. The firm owner determined the methods by which job assignments were completed and was responsible for problem resolution. The worker attached examples of required reports, which included type reports with images created by the worker using firm-provided equipment. The worker would report in the morning to client addresses provided by the firm. The worker would complete the job using a camera provided by the firm. Once jobs were completed, the worker would return home to complete reports for completed jobs. The worker's hours varied depending upon the job and were typically 8 or more hours per day. The worker performed services 85% of the time at client locations, and 15% of the time at home or in the firm's office completing reports. The worker was required to perform services personally. The owner was responsible for hiring and paying all helpers needed.

The firm states that they provided the worker with an infrared camera and a digital camera. The worker provided their own laptop. The worker did not lease any space, facilities, or equipment. The worker incurred travel expenses such as lodging and fuel. The firm reimbursed the worker for fuel, lodging, and food. The firm paid the worker an hourly wage and did not have access to a drawing account for advances. The firm carried worker's compensation insurance on the worker. Customers paid the firm for services provided. The worker faced no economic loss or financial risk. The firm established the level of payment for services provided. The worker states that the firm provided a laptop, infrared camera, gas card, and miscellaneous materials. The worker provided their own vehicle. The worker incurred the expense of mileage and maintenance on their personal vehicle. The firm reimbursed the worker for mileage. The worker was paid an hourly wage with no access to a drawing account. The worker faced no economic loss in terms of equipment or materials. The firm established the hourly rate of pay for the services provided by the worker.

The firm states that 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. There were no non-compete agreements in place between the parties. The worker was not a member of a union and did not advertise their services to the public. The firm provided reporting templates which were used for the final report product for its customers. The worker was represented as working for the firm. The work relationship ended when the worker accepted employment at a different company. The worker states that there were no benefits offered by the firm. The worker did not provide similar services for other firms and did not advertise their services to the public. The firm represented the worker as an employee performing services under the firm's name. The work relationship ended when the worker quit to provide services to a different firm.

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, co-adventurer, 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. The firm provided work assignments by virtue of the customers served, required the worker to report on services performed using templates provided by the firm, 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 firm provided all necessary supplies, materials, and equipment for the job. The firm reimbursed the worker for certain expenses related to the job. 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.

It appears the statute has expired for the 2014 through 2017 tax years. The courtesy letter provided applies only for the year(s) the statute is open. You may wish to visit www.irs.gov or contact IRS Customer Service at 800-829-1040 to obtain additional information.

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.