

SS-8 Determination—Determination for Public Inspection

Occupation 03TEC Technicians	Determination: <input checked="" type="checkbox"/> Employee <input type="checkbox"/> Contractor
UILC	Third Party Communication: <input checked="" type="checkbox"/> None <input type="checkbox"/> 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

Information provided indicated the firm is a building insulation company. The worker performed services for the firm as an installation technician for tax years 2015 to 2017. The firm feels the workers are independent contractors and income is reported on Form 1099-MISC. The firm provided a copy of the sub contract agreement. highlights of that contract will be discussed later. The firm indicated in the information they completed that the worker obtained their own certifications. The firm stated the worker was contracted by job and paid by the job. He can accept or decline any job offered. Once accepted the firm stated the worker set their own hours and days to complete. Work was performed at the firm's customer locations. The firm stated the customer paid the firm. Either party could terminate the work relationship without incurring a penalty or liability. He was represented as a sub contractor of the firm. Any person hired to drive a company vehicle will be responsible for cleanliness, damage to interior/ exterior and maintenance logs. No smoking around equipment or construction site. Violation will cause termination. Borrowing from co-workers is prohibited. You must sign the sub-contract, non-compete agreement, Form 83, 1-9,W-9 before first check is issued. Random drug tests will be given.

The subcontract agreement states, the workers (subcontractors) are expected to be at the shop, unless otherwise notified, by seven am every morning. If they do not show up they will not be given future work. A clear outline of the work to be performed will be provided for each job. The worker must adhere to the specifications unless a written change order is made. They are paid on a production basis, that includes trailer organization, repairs to daily used equipment, resupplying the trailer for the next job with a daily log book. Subs that do not stay on the job, may be paid by the hour, rate set by the firm. The firm will pay the first exam expenses any additional exams would be at the workers expense. The firm will provided filters, suits, head socks, supplies, materials, equipment and transportation to and from jobsite.

The worker has indicated he worked solely for the firm as a crew leader/ spray foam installer and used all of their equipment. He was trained on machine operation, maintenance, certifications and all relevant trade specific job duties. Work assignments were directed by the firm owner or operations manager. He stated he submitted a weekly time sheet, the firm called it a job cost report. It provided the hours worked and the job done. He would arrive between six and eight am as required by the firm, perform the jobs assigned and return to the shop between four and six. Work was performed at the firm's customer locations. He was required to perform his services personally. The worker indicated the firm provided all equipment and supplies. He provided his own respirator. The worker stated shop time was paid by the hour, all other was paid on piece work. The worker agreed the customer paid the firm. The firm did carry workmen's compensation insurance. The worker stated he was required to work full time for the firm in almost all instances. He did not perform similar services for others. The worker agreed there was a non-compete agreement. The stated he was represented as an employee of the firm. He indicated he was fired to disagreeing with the work classification.

ANALYSIS

The question of whether an individual is an independent contractor or an employee is one that is determined through consideration of the facts of a particular case along with the application of law and regulations for worker classification issues, known as "common law." Common law flows chiefly from court decisions and is a major part of the justice system of the United States. Under the common law, the treatment of a worker as an independent contractor or an employee originates from the legal definitions developed in the law and it depends on the payer's right to direct and control the worker in the performance of his or her duties. Section 3121(d)(2) of the Code provides that the term "employee" means any individual defined as an employee by using the usual common law rules.

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.

In determining whether an individual is an employee or an independent contractor under the common law, all evidence of both control and lack of control or independence must be considered. We must examine the relationship of the worker and the business. We consider facts that show a right to direct or control how the worker performs the specific tasks for which he or she is hired, who controls the financial aspects of the worker's activities, and how the parties perceive their relationship. The degree of importance of each factor varies depending on the occupation and the context in which the services are performed.

Therefore, your statement that the worker was an independent contractor pursuant to an agreement is without merit. For federal employment tax

Analysis

We have applied the above law to the information submitted. As is the case in almost all worker classification cases, some facts point to an employment relationship while other facts indicate independent contractor status. The determination of the worker's status, then, rests on the weight given to the factors, keeping in mind that no one factor rules. The degree of importance of each factor varies depending on the occupation and the circumstances.

Evidence of control generally falls into three categories: behavioral control, financial control, and relationship of the parties, which are collectively referred to as the categories of evidence. In weighing the evidence, careful consideration has been given to the factors outlined below.

Factors that illustrate whether there is a right to control how a worker performs a task include training and instructions. In this case, you retained the right to change the worker's methods and to direct the worker to the extent necessary to protect your financial investment. A continuing relationship between the worker and the person or persons for whom the services are performed indicates that an employer-employee relationship exists. The establishment of set hours of work by the person or persons for whom the services are performed is a factor indicating control. If the nature of the occupation makes fixed hours impractical, a requirement that workers be on the job at certain times is an element of control. The worker was required to be on site by seven am in the morning. All job orders were obtained by the firm and assigned in the order they so chose.

Factors that illustrate whether there is a right to direct and control the financial aspects of the worker's activities include significant investment, unreimbursed expenses, the methods of payment, and the opportunity for profit or loss. In this case, 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. The fact that the person or persons for whom the services are performed furnish significant tools, materials, and other equipment tends to show the existence of an employer-employee relationship. 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.

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 your business. Both parties retained the right to terminate the work relationship at any time without incurring a liability.

CONCLUSION

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 contract provided by the firm clearly shows direction and control on behalf of the firm. It contradicts the firm's statement that the worker had no set hours and was free to set his own hours. It contradicts the firm's statement the worker paid for his own certifications. Furthermore, the definition of a sub-contractor is a person who owns their own business, meaning they can be in competition with the firm. There is a required non-compete agreement to be signed, before the worker can start work for the firm. The firm provided all major equipment, material and transportation to jobs sites, indicating the worker had no financial investment in the equipment or business operation. Finally, the customer paid the firm, giving the firm the right to control the work performed for their customer in order to protect their business reputation.