

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 of worker classification for services performed as a technician for the firm from November 2020 until January 2021. The worker received a 1099-NEC from the firm for 2020. The worker states that the firm misclassified the worker as an independent contractor because they were told they were an employee, they were required to follow a schedule, they were trained by the firm, the worker was paid hourly, and the worker used only the firm's equipment. There were no written agreements between the parties.

The firm states that it is a welding and fabrication shop. The worker was subcontracted by the firm to install snowplows and perform welding repairs. The firm classified the worker as an independent contractor because the worker didn't perform services full-time, the worker didn't have set hours, and the worker was informed at the time of hire that they would be treated as an independent contractor.

The firm states that there was no training given to the worker since the worker demonstrated that they were already familiar with the job at hand. The worker received job assignments verbally, and the firm owner determined the methods by which job assignments were performed. If the worker encountered any problems or complaints while working, they were required to contact the firm owner for problem resolution. The worker provided the firm with visual reports. The worker would show up at the firm's premises at 8am, take a lunch break anytime from 11am until 1pm, and would perform services approximately 4 days a week around their other job. The worker performed all services at the firm's premises. There were no meetings required of the worker, and the worker was not required to personally perform services. The worker would be required to seek approval from the firm before hiring any substitutes. If the worker paid for any substitutes, the firm would reimburse the worker. The worker states that the firm instructed the worker on welding, various mechanical jobs, and operation of forklifts, other equipment, and point of sale equipment. The worker was provided with work assignments by the firm and was given new assignments once jobs were completed. The firm owner determined the methods by which jobs were performed and assumed responsibility for problem resolution. The worker provided the firm with verbal reports on jobs. The worker performed services from 8am until 5pm, 95% of the time at the firm's premises, and 5% of the time at customer locations. There were no formal meetings required of the worker. The firm required the worker to personally perform services. The worker was not allowed to hire helpers. The firm was responsible for hiring and paying all helpers.

The firm states that they provided the worker with a welding helmet, gloves, and safety equipment. The worker could provide their own preferred welding helmet and did not lease any space, facilities, or equipment. The worker incurred no expenses. The firm paid the worker an hourly wage and allowed the worker access to a drawing account if they ever needed an advance, which they never did during the work relationship. The customers of the firm paid the firm for services provided. The firm did not carry worker's compensation insurance on the worker. The worker did not have any exposure to financial risk as they were just asked to show up at the firm's premises and use the firm's equipment to perform their job. The firm established the level of payment for services provided. The worker states that everything was provided by the firm. The worker did not lease any space, facilities, or equipment. The worker incurred gas expenses while running errands. The firm reimbursed the worker for these expenses. The firm paid the worker an hourly wage with no access to a drawing account for advances. The firm did not carry worker's compensation insurance on the worker. The worker had no exposure to economic loss or financial risk. The firm owner established the level of payment for services provided.

The firm states that they provided the worker with bonuses as a benefit. 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 worker was represented by the firm as a contractor. The worker was no longer needed and the relationship between the parties ended. The worker states that they were provided with bonuses. The relationship between the parties could be terminated by either party. The worker did not perform similar services for other firms. There were only verbal agreements between the parties. The worker was not a member of a union and did not advertise their services. The firm represented the worker to its customers as an employee performing services under the firm's name. There was not enough work to offer the worker, so the relationship ended.

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 of welding and fabrication services. The firm provided work assignments by virtue of the customers served, required the worker to verbally report on services performed, 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 the worker access to a drawing account for advances. The firm provided all supplies, materials, and equipment needed for the worker's job duties. 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. The firm provided the worker with bonuses as a benefit. 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 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.