

SS-8 Determination—Determination for Public Inspection

Occupation

03TRA Construction/Technical Services/Trades

UILC

Determination:

Employee Contractor

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

Information submitted indicated the firm is a residential construction business. The worker performed services as a carpenter/foreman for the firm in tax year 2013. The firm issued both Form W-2 and Form 1099-MISC. The firm has indicated the worker requested and submitted Form W-9 stating he was an individual sole proprietor. The worker was shown the architectural plans for the project and began framing work. The worker determined how he performed the work. He reported to the firm if there were any problems or issues. Verbal progress reports were required, the firm also did on site visits. Work was performed daily at the job site. The worker was required to perform his services personally. The firm provided the lumber and materials. The worker provided his tools, truck and other supplies. The firm indicated the worker was paid by the hour. The customer paid the firm. The firm indicated the worker determined the hourly rate paid. No additional benefits were given. Either party could terminate the work relationship without incurring a penalty or liability. The firm stated the job completed.

The worker indicated he performed services as a foreman, framing, demolition, insulating, installing windows and doors at various job locations for the firm. The worker indicated he was an employee as he did not have his own business license. Most work was done on city property, under city contracts held by the firm. He was required to perform his services personally. The firm hired and paid all workers. The firm provided him with a credit card, that he purchase materials with. He provided his truck, gas and tools. He indicated he was paid on Salary at twenty-eight dollars per hour. He was also given a 1099 that reported one thousand a week that was paid. The customer paid the firm. The worker indicated the firm determined the rate paid. The worker indicated he did not perform similar services for others. He was represented as an employee of the firm. He indicated he was fired.

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 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.

-If a worker must perform services in the order or sequence set by the person or persons for whom the services are performed, that factor shows that the worker is not free to follow the worker's own patterns of work. Often, because of the nature of an occupation, the person or persons for whom the services are performed do not set the order of the services or set the order infrequently. However, if the person or persons retain the right to control the order or sequence of the work, this is sufficient to indicate an employer-employee relationship.

-Payment by the hour, week, or month generally points to an employer-employee relationship, provided that this method of payment is not just a conv

Analysis

continued...

-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.

-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. Special scrutiny is required with respect to certain types of facilities, such as home offices.

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.

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.

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 work was performed under the firm's business name, under contracts held by the firm. The worker was paid a set salary, plus a promised additional amount per week. The worker had no financial investment in the services performed, other than his personal tools. The firm issued both a W-2 and Form 1099-MISC with no apparent changes in services performed.