

SS-8 Determination—Determination for Public InspectionOccupation
03TRA LaborerDetermination:
☒ 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 initiated the request for a determination of his work status as a laborer in tax years 2014 through 2017. The firm's business is described as residential construction building and remodeling.

The firm's response was signed by the firm's president. The firm's business is described as deck building and remodeling company. The worker's services were as carpenter's apprentice and remodeling contractor which included but was not limited to deck building, framing, painting, roofing, tile installation, and finish carpentry.

The worker stated that he was given specific training and instructions from the onset of the work relationship since he had no prior experience. The job assignments were given by the firm and the firm determined the methods by which the worker's services were performed. Any problems or complaints encountered by the worker were directed to the firm for resolution. The worker's services were rendered Monday through Friday from 8am to 4pm with factors such as weather, material delivery, permits or inspections affecting start and stop times. The worker was required to perform the services personally.

According to the firm, the worker was given directions by the firm and other contractors. The worker was responsible for processes used on the job and how the work was completed. The firm was contracted by homeowners for specific work and the worker was given the scope of the work to be completed. The worker determined the methods by which the worker's services were performed. Any problems or complaints encountered by the worker could be taken care of by the worker or were directed to the firm for resolution. The firm indicated the services were not rendered on a set schedule; the recommended hours were 8:00 am to 4:00 pm, but, were not required. The firm responded that any additional personnel were hired and paid by the worker.

The worker stated the firm provided a vehicle, trailer, hand and power tools, and materials, as well as a company credit card to purchase materials, rental equipment, gas for his vehicle and for the firm's vehicle. The worker furnished vehicle, and hand and power tools. The worker did not lease equipment, space, or a facility; however, he did incur expenses for safety gear and tool belts, gas/mileage, and tool replacement and repairs. Both parties agreed the firm paid the worker an hourly wage and the customers paid the firm and that the worker was not covered under the firm's workers' compensation insurance policy. The worker responded he was at risk for a financial loss in this work relationship if he was injured or if there was damage to the firm's vehicle/trailer, or OSHA for uncertified equipment operations. The firm established level of payment for services provided or products sold. The worker did not bid for jobs.

The firm responded that the worker was provided with supplies and materials; and, the worker furnished equipment, vehicle, and materials. The worker did not lease equipment, space, or a facility; but, he did incur expenses for his own tools. The firm indicated the worker was not at risk for a financial loss in this work relationship. The firm replied the worker established level of payment for services provided or products sold; most work was done hourly as agreed upon by the firm and worker and some work was bid on by the worker.

Both parties concur that some benefits were available to the worker and that either party could terminate the work relationship without incurring a liability or penalty. The firm indicated the worker was performing same or similar services for others during the same time frame; the worker disagreed. The firm indicated that the worker was represented as a sub-contractor completing the work contacted between the homeowner and the firm. The worker stated he was referred to as an 'employee' and was provided with the firm's logo t-shirt, hooded sweatshirt.

The firm provided a copy of the Independent Contractor agreement. The services were described in the Carpenter's Apprentice Job Description/Expectations. The worker was to be paid \$XX/hour plus bonus. Bonus criteria and amount to be determined by the firm on a job-by-job basis. The expectations covered: general responsibilities such as representing the firm in a professional manner; the standard work days and hours; supervision by lead carpenter or production manager to supervise contractors/workers in activities to which they are assigned; punch in and out using a time card; customer satisfaction included keeping job site clean (sweeping, vacuuming, and organizing tools and work area) as well as professional appearance, expert workmanship, and polite communication; the job site supervision addressed arrival before 7:30 to allow for set up and remain until 4:30; install dust, safety and security protection; protect clients property; remove large quantities of debris on a weekly basis or as needed. The firm provided copies of invoices for November of 2017. The worker stated he was to provide an invoice (during the last two months) or lose his job.

Analysis

A worker who is required to comply with another person's instructions about when, where, and how he or she is to work is ordinarily an employee. This control factor is present if the person or persons for whom the services are performed have the right to require compliance with instructions. Some employees may work without receiving instructions because they are highly proficient and conscientious workers or because the duties are so simple or familiar to them. Furthermore, the instructions, that show how to reach the desired results, may have been oral and given only once at the beginning of the 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 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.

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.

A continuing relationship between the worker and the person or persons for whom the services are performed indicates that an employer-employee relationship exists. A continuing relationship may exist where work is performed in frequently recurring although irregular intervals.

A person who can realize a profit or suffer a loss as a result of his or her services is generally an independent contractor, while the person who cannot is an employee. "Profit or loss" implies the use of capital by a person in an independent business of his or her own. The risk that a worker will not receive payment for his or her services, however, is common to both independent contractors and employees and, thus, does not constitute a sufficient economic risk to support treatment as an independent contractor. If a worker loses payment from the firm's customer for poor work, the firm shares the risk of such loss. Control of the firm over the worker would be necessary in order to reduce the risk of financial loss to the firm. The opportunity for higher earnings or of gain or loss from a commission arrangement is not considered profit or loss.

The firm's 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.

We have considered the information provided by both parties to this work relationship. In this case, the firm retained the right to change the worker's methods and to direct the worker to the extent necessary to protect its financial investment and business reputation and to ensure its customers' satisfaction and that its contractual obligations were met. The worker was not operating a separate and distinct business; 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. 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 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.

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.