

SS-8 Determination—Determination for Public Inspection

Occupation

03TRA Tradespersons

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 submitted a request for a determination of worker status in regard to services performed for the payer from March 2017 to May 2018. The work done by the worker included various tasks related to construction. The worker filed Form SS-8 as he believes he erroneously received Form 1099-MISC.

The payer's response states it is a small building and remodeling company. The worker was engaged to do carpentry work. The worker was classified as an independent contractor as he was an independent contractor before subcontracting for the payer and he is currently working as a subcontractor. The worker had contractors liability insurance.

The payer stated it did not train the worker. The worker received work assignments via phone call or in-person. The worker determined the methods by which assignments were performed. If problems or complaints arose, the worker was required to contact another subcontractor or the payer for resolution. Reports and meetings were not required. Suggested work hours were 7 am to 3 pm; however, the worker could come and go as he wanted. Services were performed at customer locations. The payer required the worker to personally perform services. The payer was responsible for hiring and typically paying substitutes or helpers. The worker could bring a helper if they were insured. The worker stated the payer bid and organized all job sites. The payer determined the methods by which assignments were performed and assumed responsibility for problem resolution. Daily, verbal reports were required. His daily routine varied based on the payer's instruction.

The payer stated the worker did not lease equipment, space, or a facility. The worker incurred the unreimbursed expense associated with his vehicle and tools. Customers paid the payer. The payer paid the worker an hourly rate of pay; a drawing account for advances was not allowed. The payer did not carry workers' compensation insurance on the worker. The worker's economic loss or financial risk related to loss of agreement if damage or negligence occurred. The worker established the level of payment for the services provided. The worker stated the payer provided all supplies, equipment, and materials. The payer established the level of payment for the services provided.

The payer stated benefits were not provided. The work relationship could be terminated by either party without liability or penalty. The worker performed similar services for others; the payer's approval was not required for him to do so. There was no agreement prohibiting competition between the parties. The worker advertised on Facebook. The payer represented the worker as a contractor to its customers. Services were performed under the worker's business name. The payer terminated the work relationship. The worker stated the work relationship could not be terminated by either party without liability or penalty as he was fired for refusing to sign a retroactive contract to cover the misclassification. He did not perform similar services for others. The payer represented him as an employee to its customers.

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, coadventurer, 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 an employment relationship exists 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 payer required the worker to personally perform services. Furthermore, the carpentry services performed by the worker were integral to the payer's business operation. The payer provided work assignments by virtue of the customers served and it ultimately assumed responsibility for problem resolution. These facts evidence the payer retained the right to direct and control the worker to the extent necessary to ensure satisfactory job performance in a manner acceptable to the payer. Based on the worker's past work experience and work ethic the payer may not have needed to frequently exercise its right to direct and control the worker; however, the facts evidence the payer retained the right to do so if needed.

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 payer 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 payer 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 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 payer's business. 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 payer 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 payer can obtain additional information related to worker classification online at www.irs.gov; Publication 4341.