

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 initiated the request for a determination of his work status as a laborer in tax year 2018, for which he received Form 1099-MISC. In this position, his job was to grind, tuckpoint, paint, stain, and do concrete and brick chimney repairs. The firm's business is described as a general contractor, exterior and interior restoration, chimney repair, painting, and concrete repair, and caulking.

The firm's response was signed by the owner. The firm's business is an exterior masonry restoration company. The worker provided services as a mason; he repaired and restored masonry on a T & M basis (time and materials) for an hourly rate. He didn't have a laborer working with him, so the firm supplied him with one of his sons or brothers. The worker occasionally did projects by the job for a set amount.

The worker stated the firm was specific with instructions on how to do the work, and if he was slow and/or doing it wrong. He received his job assignments by phone or text. The firm's owner or his son determined the methods by which the worker's services were performed; with any problems or complaints encountered by the worker being directed to the firm's owner or his son for resolution. The worker performed his services 10 hours per day straight time with no overtime paid, at the customer's location. The worker was required to perform the services personally; any additional personnel were hired and paid by the firm, noting that the firm generally he used his sons.

The firm responded that no specific training and instructions were given. The job assignments were as to the scope of the work only. The firm's owner determined the methods by which the worker's services were performed. The worker and customer only contacted the firm if the worker was not able to resolve any problem or complaint. The worker set his own hours, although services were generally rendered from 8am to 5pm at the customer's location. The worker was not required to perform the services personally; any additional personnel were hired and paid by the firm, but family only.

The worker indicated the firm provided all materials, rental equipment, and grinder blades. The worker furnished the grinder, ladder, and trowels. He did not lease equipment, space, or a facility. The worker stated he was reimbursed for materials purchased and for the purchase of or rental of equipment as well as for for nails, gas for the equipment, paint brushes, rollers, and tarps. The firm paid the worker an hourly wage with no overtime; the customers paid the firm. He was not covered under the firm's workers' compensation insurance policy; he stated the firm required to him to have workers' compensation and liability insurance with the firm named as the additionally insured. The worker responded he was not at risk for a financial loss in this work relationship; if someone made a mistake the firm paid for someone to fix the problem. The firm establish established the level of payment for services provided.

The firm acknowledged providing the materials and equipment rentals, with the worker furnishing tools, truck, fuel, ladders, small equipment, safety boots, and masks/respirator. The worker did not lease equipment, space, or a facility. The worker incurred expenses for ladders, tools, saws, gas, and truck maintenance. The firm indicated the worker was paid an hourly wage and piecework; and, the customers paid the firm. The worker was not covered under the firm's workers' compensation insurance policy because he had his own. The firm responded the worker was not at risk for a financial loss in this work relationship. The firm established the level of payment for services provided or products sold.

According to the worker, there were no benefits extended to him except an occasional small bonus. Either party could terminate the work relationship without incurring a liability or penalty. The worker was not performing same or similar services for others during the same time frame; this was his only job. He wore company T-shirts at all times and stated that if he was approached about a prospective job he gave the firm's contact information. The worker provided copies of text communications about jobs, customer requests, purchasing of materials, and workers' compensation and liability insurance and naming firm as the additional insured, and renting or purchasing of equipment. He also provided copies of invoices of materials purchased under the firm's account as well as copies of generic invoices identifying day of the week, job name, hours worked, and gas or parts purchased. The worker indicated he quit.

The firm's response indicated no benefits were made available to the worker and either party could terminate the work relationship without incurring a liability or penalty. The firm stated the worker was performing same or similar services for others during the same time frame; but, the firm's approval was not required. At the end of season the firm stopped using the worker.

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.

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.

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.

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.