

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 firm from May 2018 to November 2018 as a painter. The services performed included sanding, caulking, priming, painting, and staining cabinet doors and drawers. The firm issued the worker Form 1099-MISC for 2018. The worker filed Form SS-8 as he believes he should have received Form W-2 as an employee. The worker also disagrees with the amount reported on Form 1099-MISC.

The firm's response states it's a painting contractor business. The worker was engaged as a painter. The firm believes the worker was an independent contractor as the worker would bid on jobs as a subcontractor. The price determined if he got the job. It appears the firm and worker had a verbal agreement that the worker would provide proof of liability insurance and be responsible for his tax burden. The firm provided a copy of a insurance certificate; however, it doesn't have the worker's name on it.

The firm stated it did not provide training. The worker received work assignments through the bid. If problems or complaints arose, the firm was contacted and assumed responsibility for problem resolution. Reports and meetings were not required. The worker performed services based on the hours he set. Services were performed at customer locations. The firm required the worker to personally perform services. If the worker hired substitutes or helpers, the firm's approval was required. The worker was responsible for hiring and paying substitutes or helpers without reimbursement from the firm. The worker stated the firm designed staining techniques for cabinets and woodwork and it trained him to duplicate its style. The firm verbally provided work assignments and specific instructions on where to be, what to do, and how to do it. The firm determined the methods by which assignments were performed. Verbal communications with the firm provided the job status and whether he needed more materials. His daily routine consisted of arriving to work at 9:00am and leaving by 5:30pm, unless instructed differently by the firm. Locations included the firm's garage and customers' homes. The firm was responsible for hiring and paying substitutes or helpers.

The firm stated it did not provide any equipment or materials. The worker provided all that was necessary to carry out the job. The worker did not lease equipment, space, or a facility. The worker did not incur expenses. Customers paid the firm. The firm paid the worker a piece work rate of pay; a drawing account for advances was not allowed. The firm did not carry workers' compensation insurance on the worker. The worker did not incur economic loss or financial risk. The worker established the level of payment for the services provided. The worker stated the firm provided the shop, supplies, materials, and most equipment. He incurred the expense of travel to work and was requested to purchase liability insurance. The firm would reimburse him if he had been told to go to the store and if paint brushes needed to be replaced. The firm paid him an hourly rate of pay. Copies of the firm's checks document he was paid on a regular, recurring basis for the period in question. The firm established the level of payment for the services provided.

The firm stated there were no benefits made available to the worker. The work relationship could be terminated without penalty. There was no agreement prohibiting competition between the parties. The worker did not perform similar services for others. The worker advertising was not applicable. The worker performed services under his own name. The work relationship ended when the job was completed. The worker state the firm represented him as an employee to its customers. He performed services under the firm's business name. The work relationship ended when the firm fired him.

The firm stated the worker's responsibility in soliciting new customers did not apply. The firm provided the worker with leads to prospective customers. There were no reporting requirements pertaining to leads.

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, the firm's statement that the worker was an independent contractor pursuant to a 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. The firm provided work assignments by virtue of the customers served 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.

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. 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. As acknowledged by the firm, the worker did not incur economic loss or financial risk. Based on the piece work 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. 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.