

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 August 2017 to September 2019 as a painter. The firm issued the worker Form 1099-MISC for 2017 through 2019. The worker filed Form SS-8 as they believe they received Form 1099-MISC in error. There was no written agreement between the parties. The firm's response states it is a professional painting company. The work provided by the worker was painting. The worker was requested to perform interior painting services. The firm states that the worker had complete control over which jobs they took, how many firms they worked for, and were liable for any errors or damages that occurred on the job.

The firm states that the worker did not receive any training as they had previously had multiple years of experience contracting with another firm in the same field. The worker received work assignments via text after agreeing to take the job and to the rate of pay. The worker determined the methods by which job assignments were performed. If problems or complaints were to arise during job duties, the worker was required to contact the firm for problem resolution. The worker was held liable for any errors or damages that took place during their job duties. The firm states that the worker was not required to provide any reports to the firm. The firm states that the clients would provide the specifications and site availability and the worker would then determine their schedule based upon the client's needs and availability. The worker performed services at customer locations. The worker was not required to attend meetings or perform services personally. If substitutes or helpers were required, the firm states that the worker was responsible for hiring and paying them. The worker states that they received training and instruction on what and how would be performed, their schedule and time of arrival, behavior and clothes allowed at client's homes, and when the worker could use their cell phone. The firm owner assigned tasks via text message and determined the methods of how each job was performed. The worker states that the firm owner was responsible for all problem resolution. The worker was required to submit timecards for their time worked. The worker states that their schedule was decided between the clients and the firm owner. The worker would start their workday at the jobsite by assisting the firm owner with preparing for the tasks and then performing the job duties of interior painting. The worker states that 98% of the work was done at customer locations and 2% at the firm owner's home. The worker was not required to attend meetings but there were memos and communications of policies that occurred. The worker provided copies of text and email exchanges regarding these policy reminders and to demonstrate how tasks were assigned to workers. The worker was required to perform all services personally. If helpers or substitutes were required, the owner of the firm would hire and pay them. The workers were not advised that they could hire anyone by the firm.

The firm states that they provided paint, brushes, tape, roller cages, ladders and scaffolding. The worker had to provide brushes, drills, gel stains, and other specialty equipment used to achieve unique finishes. The worker did not have to lease space, facilities, or equipment. The worker incurred gas expenses as well as expenses for any specialty equipment, ladder, hardware, or supplies they needed. The firm would reimburse the worker for paint only. The worker was paid an hourly wage as specified by the job and did not have access to a drawing account for advances. The customer would pay the firm for all services rendered. The firm did not carry worker's compensation insurance on the worker. The worker could face economic loss due to being held liable for any damages occurring at the job site or to their own personal equipment. The worker states that they were only responsible for brushes over the years and a ladder and table once, whereas the firm provided everything else for the job. On occasion the clients would have paint they preferred to use for the jobs. The worker states that if they had to purchase any supplies for the job, the firm owner usually reimbursed the worker on their next paycheck. The worker states that they did not have any exposure to economic loss or financial risk during their job duties. The worker states that the firm owner determined the level of payment for all services rendered.

The firm states that they did not provide the worker with any benefits. The work relationship could be terminated at any time without loss or liability. The firm states that the worker performed similar services for other firms at the time they worked for the firm. The firm states that there were no agreements prohibiting competition between the firm and the worker. The worker was not a member of a union. The firm states that they represented the worker as an independent contractor to their clients. The work relationship ended when the firm rejected multiple partnership offers by the worker and the worker threatened the firm with a misclassification claim. The worker states that the firm provided the worker with bonuses as a benefit. The worker states that they did not perform similar services for other firms while working for the firm. The worker states that they started working for a similar firm prior to working for the firm, and that they discontinued working for that firm when that firm discontinued business. The worker was given advertisements by the firm to disperse to potential customers. The worker states that the firm provided all supplies and instructions for the job duties. The worker states that they were represented by the firm owner as workers and on social media as crew members under the firm's name. The worker provided screenshots of various social media posts where they were referred to as crew members under the firm's name. The work relationship ended when the worker was let go after the worker brought up the issue of misclassification.

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 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 of interior decorating. The firm provided work assignments by virtue of the customers served, required the worker to report on their time worked, 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.

Payment by the hour, day, 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. 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 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.