

SS-8 Determination—Determination for Public Inspection

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| Occupation 03TRA Tradespersons | Determination: <input checked="" type="checkbox"/> Employee <input type="checkbox"/> Contractor |
| UILC | Third Party Communication: <input checked="" type="checkbox"/> None <input type="checkbox"/> 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 March 2019 to January 2020 as a carpenter. The firm issued the worker Form 1099-MISC for 2019. The worker filed Form SS-8 as they believe they received Form 1099-MISC in error because the firm provided all supplies, materials and equipment for the job, the worker had no unreimbursed expenses, and the firm supervised the worker. The worker was also required to wear a company work shirt while on job sites. There was no written agreement between the parties.

The firm's response states it is a remodeling company. The work provided by the worker was carpentry. The worker was requested to perform carpentry duties such as tearing out walls, installing wood, plumbing, insulation, and doing trim work at customer locations. The firm states that they only provide workers with 1099-MISC pay documents at the end of the year.

The firm states that they did not provide any training to the worker. The firm states that the worker would receive assignments when they would walk through job sites with the firm pointing out what needed to be done. The firm owner determined the methods by which job assignments were performed. The worker and firm worked together jointly to reach problem resolutions should any problems or complaints arise on the job. The worker was required to fill out a time-card for the firm stating what hours and locations they worked. The firm provided examples of these time-cards. The worker would be called ahead of time for jobs and told where to perform services for the firm. The worker would perform services at any customer location that needed work performed. The worker was not required to attend any meetings and was required by the firm to perform services personally. All substitutes and helpers were hired and paid by the firm. The worker states that they were supervised by the firm during their job duties after reporting to the specified job site. The worker would be called or texted by the firm on where and when to report for specific job duties. The worker provided examples of text exchanges between the firm and worker regarding various jobs assigned. The worker states that the firm determined the methods by which these job duties were performed and was responsible for problem resolution. The firm was on-site for all job duties, which took place at various customer sites. There were no staff meetings required and the worker states that the firm was responsible for hiring and paying any additional help needed.

The firm states that they provided the worker with larger tools, wood, and any materials needed for services performed. The worker would provide their work tools. The worker did not have to lease any space, facilities, or equipment. The only expense incurred by the worker was the expense of their time. If the worker needed something for a particular job and had to pay for it themselves, the firm would reimburse the worker. The worker was paid an hourly wage by the firm with no access to a drawing account for advances. Customers of the firm paid the firm. The firm did not carry worker's compensation insurance on the worker. The worker faced the potential for damage to his own tools. The firm established the level of payment for all services rendered. The worker states that the firm provided the worker with a truck, tools, credit card, fuel, vehicle insurance, and supplies for all jobs. The worker did not have to provide anything. All expenses were paid by the firm with the firm's money. The worker was paid an hourly wage with no access to a drawing account for advances. Customers of the firm paid the firm. There was no financial risk or economic loss faced by the worker as all equipment and materials were supplied by the firm. The firm set up the bids and contracts for all work performed by the worker.

The firm states that they did not provide the worker with any work benefits. The relationship between the parties could be terminated by either party without liability or penalty. The firm states that the worker did perform similar services for other firms during the work relationship and did not need approval from the firm to do so. The firm's only stipulation was that the worker not perform under the firm's name if they were performing other jobs. The worker was not a member of a union. The worker was represented by the firm as a carpenter under the firm's name. The work relationship ended when the firm no longer had any jobs for the worker to perform. The worker states that there were no benefits offered and the work relationship could be terminated by either party without liability or penalty. The worker states that they did not perform similar services for other firms during the work relationship. The worker states that there were no non-compete agreements between the parties and the worker did not advertise their services to the public. The worker states that all jobs performed by the worker were performed as a worker under the firm's name. The worker states that the firm lost a big contract resulting in a loss of work and ending the work relationship.

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 remodeling properties. The firm provided work assignments by virtue of the customers served, supervised the worker at job sites, 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 firm provided all supplies, equipment, and materials needed for each job, and would reimburse the worker for any job-related expenses incurred while working. 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.