

SS-8 Determination—Determination for Public Inspection

Occupation

03TRA.78 Laborer/Trades

Determination:

☒ Employee☐ Contractor

UILC

Third Party Communication:

☒ None☐ Yes**Facts of Case**

Information provided indicated the firm is a residential property maintenance business. The firm stated the worker had been retained by the firm as a lawn maintenance technician in tax year 2014. The firm stated the worker met other workers at the firm's business location in the morning to perform services at the firm's customer locations. He would drive the firm truck from the shop to residential properties and perform mowing, edging, trimming, weed beds, sprinkler repairs etc. The firm provided a mowing route list every Monday. The firm stated in [REDACTED] most subdivisions did not allow work to start before 7:30, the workers determined the order they did the customers, and since they rode together, they determined when the completed the work. The worker was notified when he was hired he would be a sub-contractor. The firm did not have him sign a contract at the start of the work relationship. [REDACTED] only worked for 90 days he was brought on in the middle of July, their busiest season. [REDACTED] had a driver's license so he hired him. Due to his bad attitude and criminal past many refused to work with him. After the first week he was not being considered for long term employment. The firm stated he provided the truck, trailer, mowers and two stroke equipment. The worker was paid by the hour. The customer was paid by the firm. Either party could terminate the work relationship without incurring a penalty or liability. The worker was represented as a member of the firm's lawn care staff. The worker was let go for several reasons. The firm provided a copy of the employment application completed by the worker. A copy of the sub-contract agreement he utilizes for his workers. The worker did not sign the contract. The firm provided a copy of the weekly assignment lists he provided to the worker. Other documentation was provided that does not pertain to the actual work classification issue.

The worker stated he had responded to an advertisement for laborer services placed by the firm. He completed the firm's employment application, was interviewed and given the job. The worker stated the firm directed all work assignments. He would clock in at seven am, utilized the firm's truck and equipment. The worker indicated he had been paid by the hour. The customer paid the firm. Services were performed at the firm's client locations. The firm hired and paid all workers. He was represented as an employee of the firm. The worker agreed he was fired.

The question of whether an individual is an independent contractor or an employee is one that is determined through consideration of the facts of a particular case along with the application of law and regulations for worker classification issues, known as "common law." Common law flows chiefly from court decisions and is a major part of the justice system of the United States. Under the common law, the treatment of a worker as an independent contractor or an employee originates from the legal definitions developed in the law and it depends on the payer's right to direct and control the worker in the performance of his or her duties. Section 3121(d)(2) of the Code provides that the term "employee" means any individual defined as an employee by using the usual common law rules.

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.

In determining whether an individual is an employee or an independent contractor under the common law, all evidence of both control and lack of control or independence must be considered. We must examine the relationship of the worker and the business. We consider facts that show a right to direct or control how the worker performs the specific tasks for which he or she is hired, who controls the financial aspects of the worker's activities, and how the parties perceive their relationship. The degree of importance of each factor varies depending on the occupation and the context in which the services are performed.

Therefore, your statement that the worker was an independent contractor pursuant to an 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.

A continuing relationship between the worker and the person or persons for whom the services are performed indicates that an employer-employee relationship exists. A continuing relationship may exist where work is performed in frequently recurring although irregular intervals.

The establishment of set hours of work by the person or persons for whom the services are performed is a factor indicating control. If the nature of the occupation makes fixed hours impractical, a requirement that workers be on the job at certain times is an element of control.

Analysis

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. See Rev. Rul. 74-389, 1974-2 C.B. 330.

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. See Rev. Rul. 71-524, 1971-2 C.B. 346. Special scrutiny is required with respect to certain types of facilities, such as home offices.

ANALYSIS

We have applied the above law to the information submitted. As is the case in almost all worker classification cases, some facts point to an employment relationship while other facts indicate independent contractor status. The determination of the worker's status, then, rests on the weight given to the factors, keeping in mind that no one factor rules. The degree of importance of each factor varies depending on the occupation and the circumstances.

Evidence of control generally falls into three categories: behavioral control, financial control, and relationship of the parties, which are collectively referred to as the categories of evidence. In weighing the evidence, careful consideration has been given to the factors outlined below.

Factors that illustrate whether there is a right to control how a worker performs a task include training and instructions. In this case, you retained the right to change the worker's methods and to direct the worker to the extent necessary to protect your financial investment.

Factors that illustrate whether there is a right to direct and control the financial aspects of the worker's activities include significant investment, unreimbursed expenses, the methods of payment, and the opportunity for profit or loss. In this case, 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.

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 your business. Both parties retained the right to terminate the work relationship at any time without incurring a liability.

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. The firm owns and operates a landscaping business. The worker was required to clock in and out daily. The firm stated the workers reported to his business on a daily basis, was given a list of his clients and the services that they required to have performed. The workers drove the firm's truck, and utilized the firm's equipment to perform those services. The fact they were able to determine which client was serviced in which order, (due to the heat in [REDACTED], or a client's sleep schedule etc.) does not make them independent contractors. The firm stated he was represented as a member of his staff. The firm stated the intent had been to hire the worker on a full time basis, which indicated an employer/employee work relationship. An independent contractor does not fill out a job application to apply for a position. They would already own and operate their own business and would be in competition with the firm. The firm indicated the worker may have operated a tree trimming service. But the services performed were for the firm's clients, who paid the firm as charged for those services. The worker was paid by the hour for the work performed.