

SS-8 Determination—Determination for Public Inspection

Occupation

04FSC Foremen/Superintendents/Crew or Peer Leaders

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 October 2016 to May 2018 as an electrical foreman with the title of job runner. The services performed included designing, installing, and servicing electrical systems in commercial buildings for the firm's customers. The worker also received assistance from an apprentice that worked with him. The firm issued the worker Form 1099-MISC for the years in question. The worker filed Form SS-8 as he believes he erroneously received Form 1099-MISC. The worker also disputes the amounts reported on Form 1099-MISC.

The firm's response states it is an electrical contracting business. The worker was engaged as a job runner to perform electrical work. The worker was classified as an independent contractor as he could perform similar services for others; work was not always guaranteed; the worker elected to be paid on a 1099. There was no written agreement between the parties.

The firm stated it provided the worker job requirements, plans, and specs, i.e. work assignments. If problems or complaints arose, the firm was contacted and assumed responsibility for resolution. Reports included a weekly time call. The worker's routine consisted of arriving at the job and working an eight-hour day. Meetings were not required. The firm did not require the worker to personally perform services. The firm was responsible for hiring and paying substitutes or helpers. The worker stated the firm also provided him specific instruction related to where to go, what hotel to stay at, when to work, what helper to take with him, where and when to get materials, etc. The firm ultimately determined the methods by which assignments were performed. Work hours were reported via text message. Work-related expense receipts were turned into the firm. The firm required he personally perform services.

The firm stated it provided all supplies, equipment, and materials. The worker provided hand tools. The worker did not lease equipment, space, or a facility. The worker incurred the unreimbursed expense of personal benefits and insurance. Customers paid the firm. The firm paid the worker an hourly rate of pay; a drawing account for advances was not allowed. The firm did 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 he did not incur expenses in the performance of services for the firm. The firm paid him salary. The firm established the level of payment for the services provided.

The firm stated the benefits of paid holidays and bonuses were made available to the worker. The work relationship could be terminated by either party without incurring liability or penalty. The worker performed similar services for others; the firm's approval was not required for him to do so. There was no agreement prohibiting competition between the parties. It is unknown if the worker advertised. The firm represented the worker as a job runner to its customers. Services were performed under the firm's business name. The work relationship ended when the contract ended. The worker stated he did not perform similar services for others or advertise. The firm represented him as an employee to its customers. The work relationship ended due to cash flow issues.

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.

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 services performed by the worker were integral to the firm's business operation. The firm provided work assignments, required the worker to report on hours 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, 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. As acknowledged by the firm, the worker did not incur economic loss or financial risk. Based on the hourly or salary 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.