

SS-8 Determination—Determination for Public Inspection

Occupation 04MAN Managers/Supervisors	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 January 2016 to January 2017 as director of operations. The work done by the worker included new business development, bidding proposals, and project management under the firm's direction. 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 firm's response states its business is to supply and install stone counter tops and sinks in multi-family apartment projects. The worker was engaged as manager of field operations. He developed, completed, and managed counter top and sink installations in apartment projects. The worker was an independent contractor as he established his own schedule, objectives, and management. There was no written agreement between the parties.

The firm stated it and the worker determined the methods by which assignments were performed. The firm was contacted if problems or complaints arose. The worker was responsible for resolution. The worker's daily routine consisted of developing project leads, making sales calls, and presentations. Services were performed in the worker's home. The firm and worker had ongoing telephone and email communications. The firm required the worker to personally perform services. Substitutes or helpers were not required. The worker stated the firm provided him on-the-job training related to obtaining bids and take-offs. The firm provided work assignments, by phone and email, and it determined the methods by which assignments were performed. Copies of various emails between the firm and worker were provided for review. The firm was contacted and responsible for problem resolution. The firm required the worker to prepare pipeline and expense reports. The worker performed services on a full-time basis. 80% of the worker's time was spent in his home office. 10% was spent at the firm's office and 10% at project locations. In addition to daily telephone calls (serving as meetings), the firm required the worker to attend monthly meetings and job site meetings.

The firm stated it did not provide supplies, equipment, or materials. The worker provided all that was required. The worker did not lease equipment, space, or a facility. The firm reimbursed the worker for expenses associated with auto, travel, and communications. Customers paid the firm. The firm paid the worker salary. The worker was not allowed a drawing account for advances. The firm did not carry workers compensation insurance on the worker. The firm established the level of payment for the services provided and the products sold. The worker stated the firm provided computer software, business cards, and an email account. The worker used his personal computer and cellphone.

The firm stated benefits were not provided. The work relationship could be terminated without penalty. It is unknown if the worker performed similar services for others. There was no agreement prohibiting competition between the parties. The worker advertised with business cards. The firm represented the worker as a sales representative and project manager to its customers. Services were performed under the firm's business name. The work relationship ended when the worker quit. The worker stated the firm granted him time-off for vacation, sick, and personal days when requested. He did not perform similar services for others during the period in question. Business cards were provided by the firm. The firm represented him as an employee to its customers.

The firm stated the worker was responsible for developing and completing sales and project management for counter tops and sinks. The worker was responsible for obtaining leads to prospective customers. There were no reporting requirements pertaining to leads. The project contract determined the terms and conditions of sale. Orders were submitted and subject to the firm's approval. The firm determined the worker's territory. The worker did not pay for the privilege of serving customers. The worker sold products in the business office and by telephone and email. Products included stone counter tops and sinks. 50% of the worker's time was spent soliciting orders from contractors. The worker stated the firm also provided leads to prospective customers. Leads were reported on the pipeline reports and verbally with the firm when on telephone conference calls. Terms and conditions of sales were reviewed and approved by the firm.

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. The firm provided work assignments by virtue of its business needs, it required the worker to contact it if problems or complaints arose, and it ultimately determined the methods by which assignments were performed and problems were resolved. 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 the worker presumably used his personal computer and cellphone for his personal needs, they are not considered a significant business investment. Based on the 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.