

SS-8 Determination—Determination for Public Inspection

Occupation

04MAN Managers/Supervisors

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 January 2018 to September 2018 as a general manager of operations. The firm issued the worker Form 1099-MISC for 2018. 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 worker believes they were an employee of the firm because the firm determined their schedule, all of their job duties were performed with supplies provided by the firm, and the firm paid the worker a set biweekly amount.

The firm's response states it is a contract services aggregator that hires contract services providers to provide landscape and snow removal services for clients. The work provided by the worker was that of a contract service representative. The worker was requested to interact with clients to generate service contracts and provide pricing quotes for the firm. The firm did not provide supervision or direction. The firm believes that the worker was an independent contractor because the worker had expressed an interest in starting up a contract service company and would be paid through profit sharing after overhead expenses were deducted. According to the firm, the profit sharing portion of this agreement never came to fruition.

The firm states that no specific training or instruction was given to the worker. The firm states that the worker did not receive job assignments as they maintained their own work schedule and determined the methods by which they would perform job duties. The worker was responsible for all problem resolution relating to their job. The firm states that there were no required reports from the worker to the firm and that the worker did most of their job assignments over the phone at the firm's location. The firm states that the worker did not have to provide services personally, and that if the worker required helpers or substitutes, the worker was responsible for hiring and pay for them. The worker states that they received sales training and suggestions from the firm. The worker states that the firm gave the worker the job assignments and determined the methods by which they were performed. The worker states that the firm provided the leads for prospective customers, and would require the worker to bring in new work for the firm's contractors. If problems arose during job duties, the worker states that the firm was responsible for problem resolution. The worker had to provide regular sales reports in addition to business expense reports. The worker performed services from 8a.m. until 5p.m. Monday through Friday with an hour-long lunch break. The worker states that they were required to provide all services personally and at the firm's premises. If helpers or substitutes were required, the worker states that they would hire the sub-contractors and the firm would pay them.

The firm states that they provided the worker with office supplies, the office space, computer, and office phone. The worker would be responsible for their own personal cell phone which they would use for job responsibilities as well. The worker did not have to lease space, facilities, or equipment. The only expenses incurred by the worker were travel expenses, insurance, and their cell phone expenses. The worker was paid through contract service payments and did not have access to a drawing account for advances. The firm states that the customer would pay the firm. The firm states that they collected service fees from their clients and also paid the contractors that were used by the clients. The firm states that they did not carry worker's compensation insurance on the worker. The firm states that the worker was exposed to the risk of losing their vehicle or cell phone due to damage during job responsibilities. The firm states that the worker set the level of payment for services provided. The worker states that the firm provided all of the standard office supplies and the worker did not have to provide anything for job duties. The worker states that the only financial risk they faced was their salary. The worker states that they were paid by salary and did not have access to a drawing account for advances. The customer would pay the firm, and the firm set the level of payment for all services rendered.

The firm states that they did not provide the worker with any benefits. The work relationship between the firm and worker could be ended at any time without loss or liability. The firm was unsure if the worker provided similar services to other firms while working for the firm. The firm states that there was a mutual verbal understanding about prohibiting competition between firm and worker during their work relationship. The worker was not a member of a union. The firm states that they do not know what sort of advertising the worker did for the firm but that the worker visited their clients and prospective customers. The firm states that they represented the worker as a representative most of the time. The work relationship ended when the worker quit and therefore the firm ceased services. The worker states that the firm offered them paid vacations, sick pay, and paid holidays. The worker states that they did not perform services for any other firm at the time they worked for the firm. The worker states that they would solicit new customers for the firm using firm-provided marketing material. The worker states that they were represented as the general manager of operations of the firm. The worker states that the work relationship ended when they decided to pursue another opportunity.

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 the customers served, required the worker to report on services performed through sales reports and expense reports, 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 biweekly 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.