

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 July 2018 to December 2018 as a building manager. The firm issued the worker Form 1099-MISC for 2018 and 2019 wherein the worker provided services for 2 additional months. The worker filed Form SS-8 as they believe they received Form 1099-MISC in error. The worker believes they were incorrectly classified as an independent contractor because they had set hours and duties.

The firm's response states it is a non-profit veterans organization. The work provided by the worker was building and grounds maintenance. The worker was requested to perform routine maintenance on the building and grounds of the firm as well as office duties. The firm provided a copy of the job description, outline of benefits offered to the worker, outline of duties required of the worker, contract between the two parties, and letter correspondence from the worker for our consideration.

The firm states that they provided the worker with on the job training and they outlined the job duties of the worker in a job description that was created by the firm. The firm did not indicate how the worker received job assignments. The firm states that the worker determined the methods by which job assignments were performed. If the worker encountered any problems or complaints during their job duties, they were responsible for contacting the firm's post commander for problem resolution. The worker did not have to submit any reports to the firm. The firm states that the worker determined their own schedule, but an attached job requirement list provided by the firm states a set schedule by the firm. The worker prioritized their job schedule based upon maintenance that was required for the building and the grounds, office duties for rentals, and taking messages. The worker was required to perform all services at the firm's hall residence. The worker was required to attend a monthly meeting for the VFW post or to create a written report for the firm. The worker was required to perform all services personally. Helpers or substitutes were not applicable to the work relationship. The worker states that they did not receive training or instruction from the firm and that the firm's building committee assigned tasks to the worker and determined the methods by which they were performed. The worker states that the VFW post commander was responsible for problem resolution. The worker was required to provide reports to the firm at meetings. The worker states that they had set hours of 9a.m. until 3p.m. Monday through Thursday, and all job duties took place at the firm's location. The worker was required to attend monthly meetings and perform all services personally. If helpers or substitutes were required, the firm's building committee was responsible for hiring and paying the additional help.

The firm states that they provided the worker with office supplies, small tools, lawn care equipment and snow removal equipment. The worker provided some small tools for their job. The worker did not have to lease space, facilities, or equipment. The worker would sometimes incur the expense of repair supplies. The firm would reimburse these repair supply expenses. An attachment provided by the firm demonstrates a monthly allowance that the worker had access to in order to pay for small tools and materials needed for the worker's job. The worker was paid a salary by the firm and was not allowed access to a drawing account for advances. The firm provided a job description which included salary information regarding a set amount on a bi-weekly basis and stating that the worker would be considered a part-time employee of the firm. This job description included requirements regarding the worker keeping track of their hours in order to receive payment. Customers of the firm would pay the firm directly for all services rendered. The firm did not carry worker's compensation insurance on the worker. The firm set the level of payment for all services rendered. The worker states that the firm provided all of the supplies and equipment for the job and the worker was not responsible for providing anything. The worker did not have any expenses in the performance of services for the firm. The worker was paid an hourly wage with no access to a drawing account for advances. The firm set the level of payment for all services rendered and received payments from customers. The worker did not have any exposure to economic loss or financial risk during the work relationship.

The firm states that they provided the worker with paid holidays as a benefit. The relationship could be terminated by either party without incurring loss or liability. The worker did not perform similar services for any other firm at the time they worked for the firm. There were no agreements prohibiting competition between the parties. The worker was not a member of a union. The worker did not advertise their services to the public. The firm states that they represented the worker as part of the firm. The worker was dismissed when the firm faced financial difficulties. The worker states that they were provided with paid holidays as a benefit and did not advertise their services to the public. The worker states that they were represented as the building manager of 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 maintenance required per their job duties, required the worker to report on services performed at meetings, 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 set bi-weekly 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. The firm provided benefits to the worker as part of their work agreement. 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.