

SS-8 Determination—Determination for Public Inspection

Occupation

Managers/Supervisors/Administrators

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 connection with services performed for the firm from January 2018 to January 2019 as a project manager. The services performed included grinding and polishing concrete, repairing concrete, and applying toppings and coatings to concrete. The firm issued the worker Form 1099-MISC for 2018 and 2019. The worker filed Form SS-8 as he believes he erroneously received Form 1099-MISC.

The firm's response states its business polishes concrete floors and installs epoxy floor systems. The services performed by the worker included polishing concrete and installing epoxy floor systems using the firm's equipment, as well as the worker using his own tools and equipment. The worker was classified as an independent contractor based on a verbal agreement and the worker's request to be paid as such. The worker negotiated a daily rate of pay and retained the right to accept or decline work offers from the firm. The worker signed Form W-9, Request for Taxpayer Identification Number and Certification.

The firm stated it did not train the worker. It provided the worker instructions on bids it had won and when the start date began based on customer needs. The worker could accept or decline work. The worker determined the methods by which assignments were performed. The worker had the ability to remedy any complaints or problems based on his extensive knowledge. Reports and meetings were not required. The worker determined his daily schedule within the time frame given by the customer to perform and complete the work. Services were performed at various customer locations. Jobs typically took from 1 to 4 days to complete. The firm did not require the worker to personally perform services. Most of the time the firm had other employees to help. On occasion the worker brought in help. The firm was responsible for paying substitutes or helpers. The worker stated the firm provided job specific orders including location, time, and date-specific orders on how the floor was installed and finished; ongoing training was provided through product reps. The firm determined the methods by which assignments were performed and it assumed responsibility for problem resolution. The worker performed services 8 to 15 hours a day until the project was completed. The firm required the worker to personally perform services. The firm was responsible for hiring and paying substitutes or helpers.

The firm stated it provided grinders, vacuums, supplies, and a truck. The worker provided his own equipment as well. It is unknown if the worker leased equipment, space, or a facility. The worker incurred the unreimbursed expense associated with his personal tools, tooling, travel to job sites, and workers' comp. The worker was also paying for Google ads to generate his own business. Customers paid the firm. The firm paid the worker a negotiated daily rate of pay; a drawing account for advances was not allowed. The firm did not carry workers' compensation insurance on the worker. The worker's economic loss or financial risk related to loss or damage of his equipment and tools, in addition to any work-related medical issues. The worker did not establish the level of payment for the services provided or the products sold. The worker stated the firm provided all materials and equipment, including all work-related expenses and travel time. He did not lease equipment, space, or a facility. He did not incur expenses in the performance of services for the firm. He did not incur financial risk. The firm established the level of payment for the services provided or the products sold.

The firm stated the worker received bonuses in 2018 for completing big projects on time. 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. The worker advertised online. The firm represented the worker as a subcontractor to its customers. Services were performed under the firm's business name; however, the worker also marketed his own business to the firm's customers. The work relationship ended when the worker quit to run his own business full-time. 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 when the firm picked up the company truck and stopped calling him.

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 by virtue of the customers served, collected customer payment for services performed, and ultimately 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 daily 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. 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.