

SS-8 Determination—Determination for Public Inspection

Occupation 04OPC Charter Boat Captain	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 May 2018 to October 2018 as a charter captain. The firm issued the worker Form 1099-MISC for 2018. The worker filed Form SS-8 as they received a letter regarding their tax liability for self employment taxes.

The firm's response states it provides sailboat charters. The work provided by the worker was captain and maintenance. The worker was requested to run sailing charters for the firm's customers. The firm did not provide supervision or direction. There were no written agreements between parties.

The firm states that they did not provide the worker with any training or instruction regarding their job duties. The worker would receive job assignments by checking a reservation sheet to see if there was any available work. The firm states that the worker had 20 years of sailing experience and was a licensed captain and therefore determined the methods of how job assignments were performed. The firm states that if problems or complaints arose during the boat charter experience, the worker would be responsible for problem resolution or call a tugboat for assistance. The worker was required to fill out a logbook by law. The firm states that the worker would show up for work depending upon whether or not reservations were made by passengers, prep the boat, and then load it with passengers. The firm states that the worker had complete control over the vessel on which they sailed. The firm states that the job responsibilities took place aboard various vessels depending upon the weather. The worker was not required to attend any meetings and was required to perform all services personally. The firm states that if helpers or substitutes were needed, the worker could hire a helper or ask the firm for a sub and the firm would pay the assistants. The worker states that they were provided with information regarding the unique characteristics of each vessel the firm used for sailing. The worker states that they were provided with a weekly charter schedule, and they determined the methods by which job assignments were performed. If problems or issues arose during job responsibilities, the worker was responsible for contacting the booking agent first and the firm second for problem resolution. The worker would maintain a daily log on the day that they worked. The worker would arrive at 0900 hours to perform a maintenance check and prep the boat for passengers, then would take up to 4 charters onto the water daily until sunset. The worker states that 10-15% of the time is spent at the firm's marina and the remainder of the time is out on the water. The worker states that there was a periodic staff meeting but no penalties for not attending. The worker was required to perform all services personally and any substitutes or helpers were the responsibility of the firm to hire and pay.

The firm states that they provided the worker with a boat and safety gear. The worker was required to provide a portable radio, personal safety gear, a life vest, and whatever other gear that they felt they would need to complete the trip. The worker did not have to lease space, facilities, or equipment for the job duties. The firm states that the worker did not have any significant expenses during their job duties beyond the cost of their license. The worker was paid on a piece work basis for each charter run they would perform and did not have access to a drawing account for advances. The firm states that the worker received the majority of the money from customers in cash as tips, and the firm would also pay the worker. The firm states that the worker could face the loss of his license or jail if he violated any federal boating regulations or if there was a loss of life aboard the vessel. The worker set the level of payment for all services rendered. The worker states that the firm provided the boat, sails, fuel, crew, uniform, insurance, advertising and drug screening. The worker had to provide extra uniforms, sunglasses, and foul weather gear, their only expenses. The worker did not have to lease space, facilities, or equipment. The worker was paid an hourly wage for maintenance duties performed and then paid on a piece work basis for each charter run. Customers would pay the firm for services rendered. The firm did not carry worker's compensation insurance on the worker and the worker did not have any exposure to economic loss or financial risk. The worker states that 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 worker and the firm could be terminated at any point without liability or loss. The firm was unaware if the worker performed similar services for any other firm. There were no agreements prohibiting competition between the parties. The worker was not a member of a union. The worker presented themselves as a captain of the vessel. The worker states that they were provided with bonuses by the firm. The work relationship could be terminated by either party without incurring loss or liability. The worker did not perform similar services for any other firm. The worker did not advertise their services to the public. The worker states that they were represented as a contractor under the firm's name. The work relationship still continues to happen.

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, 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 beyond personal safety equipment and small tools required for the charter expeditions. The term "significant investment" does not include tools, instruments, and clothing commonly provided by employees in their trade; nor does it include education, experience, licensing, or training. Based on the piecework 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 worker was represented under the firm's name. 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.

In IRS Letter Ruling 8842037, July 26, 1988, a captain who operated a chartered vessel owned by a firm in the charter business was an employee. Customers chartered the boat through the firm. The worker was responsible for operating the vessel, He was not responsible for soliciting customers. He was not given any training or instructions by the firm, nor was he supervised by the firm in the performance of his services. All equipment needed by the captain was provided by the firm. The case specifics are the same in both instances.

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.