

SS-8 Determination—Determination for Public Inspection

Occupation

ESW - Enforcement / Security Workers

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 determination in connection with services performed for the firm as a security officer from 2022-2025. Services performed included providing security services at a construction site. The worker filed Form SS-8 as they believe they were misclassified. The worker believes they were an employee as they were performing similar services as others for the firm that were being paid as employees and receiving Form W2.

The firm's response states its business provides short-term security services at construction sites and special events. The worker was engaged as a security guard. Services performed included patrolling either in their vehicle or on foot to make sure there are no unauthorized personnel on site and visually protecting site assets. The worker was classified as an independent contractor as there was an independent contractor's agreement between the parties. The worker determined hours and days worked, vehicle, and uniform. The worker was performing services for others as an independent contractor.

The firm states the worker received training on how to perform asset protection as set forth in the independent contractor's agreement. The worker received assignments based on their availability. The worker determined the methods by which those assignments were performed. If problems or complaints arose, the firm would be contacted. Both parties would be responsible for resolution. The worker was required to complete reports that were completed through a phone application. The firm did not require the worker to attend any meetings. Services were performed on the premises of the firm's client on an as-available basis. The firm required the worker to personally perform services which was stipulated in the agreement between the parties. The worker could not hire substitutes or helpers without consent from the firm. The worker stated they received training from the firm. The firm provided work assignments and determined the methods by which those assignments were performed. If problems or complaints arose, the firm was contacted as well as responsible for resolution. The firm requires the worker to complete reports and attend meetings. Services were performed on a regularly scheduled basis. The worker was required to perform services personally. The firm was responsible for the hiring and paying of substitutes or helpers.

The firm states they provided the worker with the phone application needed to perform services. The worker provided a vehicle and uniform. The worker was responsible for the maintenance of both. The worker did not lease space, equipment, or a facility. The worker incurred the job-related expenses of fuel. This expense was reimbursed by the firm as the firm was reimbursed by their client. The firm's clients paid the firm. The worker was paid an hourly rate of pay. The worker could request advance payment. The worker did take a financial risk and could suffer a financial loss performing services. The worker determined the rate of pay for the services provided. The firm did not carry workers' compensation insurance on the worker. The worker states the firm provided fuel, uniforms, flashlight, cleaning supplies, and unusually a vehicle. The worker provided a vehicle. The worker did not take a financial risk and could not suffer a financial loss performing services. The firm set the rate of pay for the services provided.

The firm states there were no benefits made available to the worker. Either party could end the work relationship without penalty. It was unknown to the firm if the worker performed similar services for others during the term of the work relationship. There were no agreements prohibiting competition. Services were performed under the firm's business name as the firm would bill the customer and the worker would invoice the firm for hours worked. The worker ended the work relationship. The worker states they received the benefit of a Christmas bonus. The worker did not perform similar services for others. Services were performed under the firm's business name.

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 the case the firm required the worker to personally perform services. The firm provided work assignments by virtue of clients served 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.

Factors that illustrate whether there is a right to control how a worker performs a task include training and instructions. The need to direct and control a worker and their services should not be confused with the right to direct and control. The worker provided their services on behalf of and under the firm's business name rather than an entity of their own. The firm was responsible for the quality of the work performed by the worker and for the satisfaction of their clients. This gave the firm the right to direct and control the worker and their services in order to protect their financial investment, their business reputation, and their relationship with their clients.

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. Based on the hourly 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. Both parties retained the right to terminate the work relationship at any time without penalty. There is no evidence to suggest the worker performed similar services for others as an independent contractor or advertised business services to the 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.