

SS-8 Determination—Determination for Public Inspection

Occupation

07SWO Safety 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 firm is in the business of providing aerial adventures. The worker was engaged to provide services as a facilitator and zipline guide at the aerial park. He obtained the job by filling out an application. For 2017, he received Form 1099-MISC for his services. There was no written agreement.

According to the worker, the firm provided zipline guide and rappelling training as well as certification for wilderness first aid/CPR. He received his work assignments from the firm's manager who called him when work was available. The worker noted that the firm determined the methods by which the assignments were performed. Both parties agreed that the firm's manager would be contacted if any issues or problems arose. The worker submitted detailed tour injury reports when applicable. The firm indicated that the worker facilitated aerial tours at its location. When working, the worker provided the following details: he would clock-in in the morning, setup the office, inspect ziplines, setup customer equipment, then guide tours or provide customer service in the firm's office until clocking-out. Both parties agreed that the worker was to provide the services personally.

The firm provided all safety equipment, first aid supplies, harness, gloves, radios, rope, pullies and staff shirts though the firm noted only helmet, harness, and gloves were provided. Both parties agreed that the worker was paid hourly and had no other economic risk. The firm allowed advances. Both parties agreed that the customer paid the firm. In addition, the firm noted that it carried workers' compensation insurance on the worker. Both also agreed that the firm established the level of payment for services.

Both the firm and the worker agreed that there were no benefits and that either party could terminate the relationship without incurring a liability. The worker did not perform similar services for others. The relationship has ended.

Analysis

In determining whether an individual is an employee or an independent contractor under the common law, all evidence of both control and lack of control or independence must be considered. The relationship of the worker and the business must be examined. Facts that show a right to direct or control how the worker performs the specific tasks for which he or she is hired, who controls the financial aspects of the worker's activities, and how the parties perceive their relationship should be considered. The determination of the worker's status, then, rests on the weight given to the factors, keeping in mind that no one factor rules. The degree of importance of each factor varies depending on the occupation and the circumstances.

Factors that illustrate whether there is a right to control how a worker performs a task include training and instructions. In this case, the firm retained the right to change the worker's methods and to direct the worker to the extent necessary to protect its financial investment. The firm provided aerial adventures to its customers and engaged the worker to supply labor as a zipline guide as well as perform other duties as needed for its operations. While the firm noted that it had no full or part-time positions available and that the worker was a seasonal worker, he, in fact, would require some training and instructions. As a temporary or seasonal worker, the worker would still be subject to the firm's policies and direction. A worker who is required to comply with another person's instructions about when, where, and how he or she is to work is ordinarily an employee. This control factor is present if the person or persons for whom the services are performed have the right to require compliance with instructions. In this case, the worker was called when there was work and he was needed. If the nature of the occupation makes fixed hours impractical, a requirement that workers be on the job at certain times is an element of control. The worker's services for the firm were all performed at the firm's location, also a factor that suggests the firm's ability to retain control over the worker. While the worker's services were seasonal, those services were continuous. A continuing relationship between the worker and the person or persons for whom the services are performed indicates that an employer-employee relationship exists. A continuing relationship may exist where work is performed in frequently recurring although irregular intervals.

Factors that illustrate whether there is a right to direct and control the financial aspects of the worker's activities include significant investment, unreimbursed expenses, the methods of payment, and the opportunity for profit or loss. In this case, the worker did not invest capital or assume business risks, and therefore, did not have the opportunity to realize a profit or incur a loss as a result of the services provided. The worker had no investment in the firm's location, or equipment. He simply received an hourly rate of pay and had no other economic risk other than the loss of that compensation. 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.

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. There were no benefits and there was no written agreement. The worker was engaged to provide labor related to the firm's aerial operations. When doing so, the worker was not engaged in an separate business venture. The fact that his services were seasonal did not make him self-employed. 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.

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.

There is no difference for federal income tax withholding, Federal Insurance Contributions Act (FICA), and Federal Unemployment Tax Act (FUTA) between full-time employees and part-time employees and employees hired for short time periods. The necessary direction and control the firm had over the worker existed whether working full-time, part-time, or temporarily.

Please see Publication 4341 for guidance and instructions for firm compliance.