

SS-8 Determination—Determination for Public Inspection

Occupation 07SWO Traffic Control Flagger	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 in 2018 as a traffic control flagger. The firm issued the worker Form 1099-MISC for 2018, reporting both rents and non-employee compensation. The worker filed Form SS-8 as she believes she received Form 1099-MISC in error.

The firm's response states its business is providing flagger services (traffic regulation) generally for road and related contractors. The firm is hired by those needing services, which is normally on a short-term basis. The firm does not have regular employees but strictly uses independent contractors who normally come to it by word-of-mouth, social media, or online ads. Works hours are controlled by the entity which engages the firm. There are no set (work) hours and no guarantee of work. Workers should be certified to perform services; training is not paid by the firm. The worker was engaged as a flagger. The services performed included assisting in traffic control at roadway construction sites. The worker was classified as an independent contractor as she had no set hours, did not work at the firm's premises, had the option to accept or decline work assignments, received no benefits, had the right to terminate the work relationship immediately, obtained her own training, provided her own phone, vehicle, light, etc., and reported to the onsite contractor who engaged the firm. She was free to exercise her own judgment in connection with services performed, make her services available to others, and perform similar services for others. The firm did not supervise the worker. The firm paid the worker an hourly rate of pay dependent on the particular job worked. Either party could terminate the work relationship. Services were performed under an independent contractor agreement.

The firm stated it did not provide the worker specific training or instruction. The firm contacted the worker to ask if she was interested in accepting a work assignment. The worker was free to accept or reject the project. The worker determined the methods by which assignments were performed. If problems or complaints arose, the worker contacted the onsite contractor or site supervisor, not affiliated with the firm, for resolution. On rare occasion, a worker may contact the firm when an issue cannot be resolved onsite. Reports and meetings were not required. The worker's routine varied based on the firm's customers' needs. Services were performed at various job site locations. If the worker accepted the work assignment, she was expected to show up and complete the assignment. If she could not complete the assignment, the firm would find another worker to complete the work. The worker stated the firm required she complete a four-hour training course. A copy of her training certificate documents training was provided by a related business entity. A daily meeting with the firm determined the job site. The firm determined the methods by which assignments were performed and assumed responsibility for problem resolution. Reports included a customer work slip to document the hours worked, date, and job site. Her routine consisted of reporting to the job site as instructed by the firm. Once there, the firm's customer gave instructions for the job site. The firm required she attend a daily assignment meeting and personally perform services.

The firm stated it did not provide supplies, equipment, or materials. The worker provided and incurred the expense associated with her cell phone, vehicle, caution light, vest, and sign. The worker did not lease equipment, space, or a facility. Customers paid the firm. The firm paid the worker an hourly 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 was related to the responsibility of her own equipment. The firm and worker agreed on the amount to be paid for services performed at each project. The worker was not engaged in negotiations or contractual arrangements with the firm's customers. The worker stated the firm provided a vest, gloves, hard hat, safety glasses, and traffic paddles. She was unaware that part of her pay would be reported as rental income until she received Form 1099-MISC. She was paid a fixed hourly rate of pay. She did not establish the level of payment for the services provided. It is unknown if the firm or its customer determined the level of payment.

The firm stated benefits were not made available to the worker. The work relationship could be terminated by either party without incurring liability or penalty. The worker performed similar services for others. The written agreement contained a limited non-compete clause. The worker did not advertise. The firm represented the worker as an independent contractor affiliated with the firm. The work relationship ended when the worker quit. The worker stated she did not perform similar services for others. Services were performed under the firm's business name.

The independent contractor agreement states, in part, the worker would complete a work order daily for submission to the firm. It would document the location, work performed, hours worked, and compensation billed. The firm would review and approve the work order prior to making payment to the worker. The firm retained the right to establish the general nature of the work to be accomplished, require that all work was accomplished in good, workman-like and professional manner, to the firm's satisfaction, and in accordance with the scope of the agreement. The worker had the right to perform services for others with the exception that she would not compete with the firm nor perform similar services for others within a specific ge

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 written 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 flagger 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 daily services performed, and retained the right to determine how services were performed to ensure customer satisfaction. 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 and its customers. 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, 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. As the worker likely used her vehicle and cell phone for personal needs, they are not considered a significant business investment. 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, 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. 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.