

SS-8 Determination—Determination for Public Inspection

Occupation

09CMA Couriers and Messengers

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 initiated the request for a determination of her work status as a deckhand: she helped transfer acquired fish from set-netters to processing plant, printed sales tickets, tied the boat on and off the docks, helped set up transfer of fish from fish hole to processor, cleaned deck, etc. However, if tides were low and all tasks on the tender boat were completed the Captain/firm had the worker(s) do unrelated construction on his private property, such as rebuild his porch, an outhouse, and other personal projects (which he directed since she had no construction experience). After accepting the position, the firm confirmed the day rates. When the worker verbally asked for a contract, the firm said it was unnecessary. The worker was issued Form 1099-MISC for tax year 2019. The firm's business is described as a tender boat: middleman between fishing boats and fish processors. Tender boats head out to meet fishing boats at capacity, buy the fish, and then bring it back to the processing plant.

The firm's response was a letter in which he states he owns a commercial fishing boat and has received several letters over the last thirty years. He stated, deckhands on fishing boats are considered to be self-employed by the IRS. This is a longstanding IRS policy. He has hired many deckhands for seasonal work on the boat and they all receive a 1099misc the following February. The firm did not respond to specifically to Form SS-8.

The worker responded that she had no boat or construction experience prior to this work arrangement and as such was given specific training and instructions by the firm during the working season. The worker received verbal work assignments from the firm/Captain throughout the day, based on what he thought was important at the time. The firm determined the methods by which the worker's services were performed. Any problems or complaints encountered by the worker were directed to the firm for resolution. The daily schedule was determined by the firm/Captain, who decided on rotating basis whose turn it was to sleep vs. work. The daily routine such as cooking, cleaning, working on the boat or construction was performed on the firm's time frame; the boat: 70%; property: 20%; docks: 10%. The worker was required to perform the services personally; any additional personnel were hired and paid by the firm.

The firm provided the boat, land property, power tools for construction projects on land, food, gas, and airfare ticket to job site. The worker furnished clothing and airplane ticket home. The worker did not lease equipment, space, or a facility. The firm paid the worker a day-rate, paid in full at the end of season. The customers paid the firm. The worker was not covered under the firm's workers' compensation insurance policy. The worker indicated she was not at risk for a financial loss in this work relationship except for loss of pay at the end of the season. The firm established the level of payment for services provided. In a copy of an email, the firm stated 'you won't be paid for the day you fly in or out and the days before June 17th are compensated at \$XX/day. On the 17th and after, the day rate is \$YY/day and I am hoping for a contract extension so I can employ you as long as possible.'

There were no benefits extended to the worker. Either party could terminate the work relationship without incurring a liability or penalty. The worker was not performing same or similar services for others during the same time frame; the worker stated the firm controlled all waking hours – there was no time to work for others. The worker indicated she was represented as an employee under the business name/the boat name. The work relationship ended when the job ended.

As reported on www.irs.gov: Certain fishermen who work on a fishing boat are considered to be self-employed for purposes of employment and self-employment taxes. A fisherman is considered self-employed if he meets all of the following conditions:

- 1.He receives a share of the catch or a share of the proceeds from the sale of the catch.
- 2.His share depends on the amount of the catch.
- 3.He receives his share from a boat (or from each boat in the case of a fishing operation involving more than one boat) with an operating crew that is normally made up of fewer than 10 individuals. This requirement is considered to be met if the average number of crew members on trips the boat made during the last 4 calendar quarters was less than 10.
- 4.He does not get any money from his work (other than his share of the catch or of the proceeds from the sale of the catch), unless the pay meets all of the following conditions.
 - He does not get more than \$100 per trip
 - He is paid only if there is some minimum catch.
 - He is paid solely for additional duties (such as for services performed as mate, engineer, or cook) for which additional cash payments are traditional in the fishing industry.

Analysis

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. Some employees may work without receiving instructions because they are highly proficient and conscientious workers or because the duties are so simple or familiar to them. Furthermore, the instructions, that show how to reach the desired results, may have been oral and given only once at the beginning of the relationship.

Training a worker by requiring an experienced employee to work with the worker, by corresponding with the worker, by requiring the worker to attend meetings, or by using other methods, indicates that the person or persons for whom the services are performed want the services performed in a particular method or manner. This is true even if the training was only given once at the beginning of the work relationship.

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.

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.

The fact that the person or persons for whom the services are performed furnish significant tools, materials, and other equipment tends to show the existence of an employer-employee relationship.

Lack of significant investment by a person in facilities or equipment used in performing services for another indicates dependence on the employer and, accordingly, the existence of an employer-employee relationship. 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. Also, if the firm has the right to control the equipment, it is unlikely the worker had an investment in facilities.

A person who can realize a profit or suffer a loss as a result of his or her services is generally an independent contractor, while the person who cannot is an employee. "Profit or loss" implies the use of capital by a person in an independent business of his or her own. The risk that a worker will not receive payment for his or her services, however, is common to both independent contractors and employees and, thus, does not constitute a sufficient economic risk to support treatment as an independent contractor. If a worker loses payment from the firm's customer for poor work, the firm shares the risk of such loss. Control of the firm over the worker would be necessary in order to reduce the risk of financial loss to the firm. The opportunity for higher earnings or of gain or loss from a commission arrangement is not considered profit or loss.

We have considered the information provided by both parties to this work relationship, as well as the fishing industry. 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 and business reputation and to ensure its customers' satisfaction and that its contractual obligations were met. The worker was not operating a separate and distinct business; 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 firm guaranteed a daily rate regardless of the work performed. 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 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.

CONCLUSION

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.

Please see www.irs.gov for more information including Publication 4341 Information Guide for Employers Filing Form 941 or Form 944 Frequently Asked Questions about the Reclassification of Workers as Employees and Publication 15 (Circular E) Employer's Tax Guide.