

SS-8 Determination—Determination for Public Inspection

Occupation 09DVC Driver	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 initiated the request for a determination of his work status as a truck driver in tax years 2012 through 2017. The firm's business is described as trucking.

The firm's response was signed by the firm's president. The firm's business is described as a local and over-the-road trucking company. The worker performed services as local and over-the road short haul driver for the firm.

According to the firm there was no specific training or instructions given to the worker. The job assignments were via a phone call from the firm; the firm stated the worker could accept or decline work. Any problems or complaints encountered by the worker were directed to the firm for resolution. The worker was required to remit mileage reports and driver logs. The worker was required to perform the services personally.

The worker concurred that no specific training or instructions were provided by the firm, that job assignments were initiated by the firm, and any problems that arose were handled by the firm. The firm determined the methods by which the worker's services were performed. He was required to turn in the log book and trip sheets. The services consisted of doing a local run on Monday and out-of-state trips two times per week. The worker indicated he was not required to perform the services personally; any additional personnel were hired and paid by the firm.

The firm and worker acknowledged the firm provided the log book, trip sheets, truck, trailer, fuel and oil; the worker furnished nothing. The worker did not lease equipment and did not incur expenses in the performance of the job (firm reimbursed for someone to unload truck). The worker was paid 25% of what the truck made; the customers paid the firm. Both parties concurred the worker was allowed cash advances as needed, which were deducted from his next check. The worker was not covered under the firm's workers' compensation insurance policy. The worker was not at risk for a financial loss in this work relationship. The firm established the level of payment for services provided or products sold.

There were no benefits extended to the worker other than paid vacations (according to the worker) and bonuses (according to the firm). Either party could terminate the work relationship without incurring a liability or penalty. The worker stated he was not performing same or similar services for others during the same time frame. The firm responded that at the time of the contract, the worker had a small engine repair shop, tree trimming business, and performed storm relief; and therefore, hauled for the firm at his discretion.

The firm provided the copy of the firm's contract: the worker was an Independent Contractor, who was responsible for his taxes, and his own health and liability insurances; and, was not entitled to benefits.

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.

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.

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.

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.

If the person or persons for whom the services are performed ordinarily pay the worker's business and/or traveling expenses, the worker is ordinarily an employee. An employer, to be able to control expenses, generally retains the right to regulate and direct the worker's activities.

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.

The firm's statement that the worker was an independent contractor pursuant to an 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.

We have considered the information provided by both parties to this work relationship. 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. 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

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.