

SS-8 Determination—Determination for Public Inspection

Occupation

09DVC Drivers & Vessel Control

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 a pilot car service escorting oversize loads on city roads, and state and federal highways. The worker was engaged by the firm as a driver. The firm reported the worker's remuneration on Forms 1099-MISC for 2013 through 2017.

The firm submitted the "Contract for Independent Contractor Relationship" dated July 20, 2013, stating, among other things, that the parties intend that an independent contractor-owner relationship will be created with this contract, the worker is not entitled to any benefits, the firm will not use the worker exclusively, and the worker is free to contract for similar services with other firms while under this contract; the work to be performed will be entirely at the worker's risk, and the worker will assume all responsibility for the condition of any vehicle and equipment used in the performance of this contract; the worker will carry public liability insurance in the amount acceptable to the firm, and the worker will indemnify the firm for any and all liability or loss arising in any way out of the performance of this contract; either party may cancel this contract with 30 days' written notice; the services and hours of the worker on any given day will be entirely within the worker's control, and the firm will rely upon the worker to put in such number of hours as is reasonably necessary to fulfill the services and purpose of the contract, which may vary; as the worker will acquire or have access to confidential information, the worker will not perform any services for any other person or firm without the firm's prior written approval, and if the worker violates this provision, this contract will be terminated; the worker shall control the conduct and means of performing the work under this contract, and he shall be free to practice his profession for others during those periods when not performing under this contract; the work and services shall be performed by the worker and no other person except upon written approval by the owner; and the worker is not entitled to unemployment insurance benefits and is obligated to pay federal and state income taxes on any monies received.

A "Workman's Compensation Exemption Form" is provided by the firm stating that the worker performs contractual work for the firm and claims to be exempt from workers' compensation insurance coverage by virtue of owing the assets of a business, company, or service known as "[REDACTED]"; he manages and controls such business, company, or service; he has ultimate responsibility for all decisions; and he is subject to realize any profit or loss as evidenced by being required to file Schedule C or Schedule A and L (Form 1065). The worker understands that if he is injured while performing contractual work for the prime contractor, he will not be covered for such injury under the prime contractor's insurance policy. The worker further understands that he is still required to provide workers' compensation for his employees.

The firm stated that it did not train or instruct the worker; the worker stated that he was required to study for the pilot car certification test, and the firm paid for the class and exam. The firm called the worker with customer information and load details and asked if he wanted to take the assignment. If the worker declined, it was offered to another worker. The worker was required to perform his services personally.

The firm provided the pilot cars, which were equipped to meet safety regulations. The worker provided his cell phone, and personal safety equipment and clothing. The firm paid the worker at a rate per pilot car service, as determined by the firm. Customers paid the firm directly at prices negotiated between the firm and its customers. The firm did not cover the worker under workers' compensation. The worker would have been responsible for the cost of damages to vehicles and company property. Neither party indicated an investment by the worker in the firm or a related business.

The firm did not make benefits available to the worker. It did not prohibit the worker from providing similar services for others during the same time period. There is no evidence submitted showing the worker advertised his services or maintained a business listing. The worker provided services under the firm's name. The worker terminated the work relationship.

Analysis

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 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.

Factors that illustrate whether there was a right to control how a worker performed a task include training and instructions. In this case, the firm ensured that the worker met certification requirements, showing it 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 the worker with its customers' specifications. The worker's schedule was dependent upon the firm's customers and varied. The establishment of set hours of work by the person or persons for whom the services are performed is a factor indicating control. 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. 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. The worker was required to perform his services personally. 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. These facts show that the firm retained behavioral control over the services of the worker.

Factors that illustrate whether there was 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. "Profit or loss" implies the use of capital by a person in an independent business of his or her own. 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. These facts show that the firm retained control over the financial aspects of the worker's services.

Factors that illustrate how the parties perceived 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 were part of the service recipient's regular business activities. In this case, the worker performed his services on a continuing basis. 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. The worker performed his services under the firm's name. The worker was not engaged in an independent enterprise, but rather the driving services performed by the worker were a necessary and integral part of the firm's pilot car business. 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. The worker could have performed similar services for others during the same time period; however, it is possible for a person to work for a number of people or firms concurrently and be an employee of one or all of them. Although the firm did not provide benefits to the worker, the worker terminated the work relationship without incurring a liability. If the worker has the right to end his or her relationship with the person for whom the services are performed at any time he or she wishes without incurring liability, that factor indicates an employer-employee relationship. These facts show that the firm retained control over the work relationship and services of the worker.

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.