

SS-8 Determination—Determination for Public Inspection

Occupation 09DVC Drivers & Vessel Control	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

Information provide indicates the firm is a professional carriage company, providing guided city tours, carriages for weddings and private events. The worker performed services for the firm in 2017 as a guided tour/coachmen. The firm reported the income on Form 1099-MISC stating since it is a seasonal company, the workers are independent contractors. The firm has indicated the workers will tell them of their availability, and the firm will then schedule work around their schedules. They are required to pay for and obtain a tour guide license from the city. The City Manager requires the firm to provide fifteen hours of daylight driving training and six hours of darkness training. They contact the firm if there are any issues and/or complete an accident report if required. The workers are responsible to get the carriage and harness ready for their shift, do a safety check before heading out. The tours are either booked online or by the Visitor Center. The workers are allowed to pick up trips if none are scheduled and keep the proceeds for those trips. The firm utilizes two third parties to book and collect payment for the tours, they pay the firm, the in turn pays the workers. The firm provided the horses and carriages. The worker is required to pay a twenty-five lease fee on a yearly basis. The firm indicates the worker provides her own uniform, boots, license etc. Meetings are required as scheduled. The worker is required to perform her services personally. Substitutes can be utilized from an approved list the firm has. the price of the tours are negotiated between the firm and the city and by what the market allows. Either party could terminate the work relationship without incurring a penalty or liability. The firm indicated the worker was released from her contract due to poor performance.

The firm provided a copy of the contract. It stated they require them to comply with the required dress code. The company may provide work clothing bearing the company's trademark, in order to better identify the worker as part of the company system. It proceeds to list the policy and procedures that are required to be followed. They are required to take drug/alcohol testing and back ground check. It states the worker(s) would be carried under the firm's liability insurance. They are responsible for compliance with all laws, rules, regulations for payroll and employment taxes.

The worker indicated she answered an advertisement placed by the firm for tour guides and coachmen. She completed an application, was granted an interview and subsequently hired for the position. The worker agreed she was given training how to drive the carriage and given daily instructions before each carriage ride via texts, phone or in person from the firm. The firm determined the work schedules, if they could not work, they would instruct the firm and they would change the schedule accordingly. she agreed verbal reports were required to be completed if applicable. She was required to report to the owner how many rides they gave during the shift. She was required to be at the carriage house 11/2 hours prior to the first ride. The route was determined by the firm. Staff meetings were required. She was required to perform her services personally. The worker agreed the firm provided the hors and equipment, carriage and refreshments for the guests. The worker provided two work shirts for weddings and private events and the firm provided shirts for tour rides. The worker indicated she was paid a flat rate per shift, plus tips. The customer paid the firm. All work was performed under the firm's business name. The worker indicated she was terminated by the firm.

Analysis

The question of whether an individual is an independent contractor or an employee is one that is determined through consideration of the facts of a particular case along with the application of law and regulations for worker classification issues, known as "common law." Common law flows chiefly from court decisions and is a major part of the justice system of the United States. Under the common law, the treatment of a worker as an independent contractor or an employee originates from the legal definitions developed in the law and it depends on the payer's right to direct and control the worker in the performance of his or her duties. Section 3121(d)(2) of the Code provides that the term "employee" means any individual defined as an employee by using the usual common law rules.

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.

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. We must examine the relationship of the worker and the business. We consider 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. The degree of importance of each factor varies depending on the occupation and the context in which the services are performed.

Analysis

Therefore, your 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 between the parties).

We have applied the above law to the information submitted. As is the case in almost all worker classification cases, some facts point to an employment relationship while other facts indicate independent contractor status. 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.

Evidence of control generally falls into three categories: behavioral control, financial control, and relationship of the parties, which are collectively referred to as the categories of evidence. In weighing the evidence, careful consideration has been given to the factors outlined below.

Factors that illustrate whether there is a right to control how a worker performs a task include training and instructions. In this case, you retained the right to change the worker's methods and to direct the worker to the extent necessary to protect your financial investment.

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.

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 your business. Both parties retained the right to terminate the work relationship at any time without incurring a liability.

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. The fact the firm's business is seasonal, and services are performed on a part time basis, flexible work schedule, does not make a person an independent contractor. Many individuals acquired second jobs to supplement their income, have something to do after retirement, etc. It does not mean that individual owns and operates their own business (i.e an independent contractor.) The worker answered an advertisement for a position offered by the firm. She completed a job application and was interviewed for the position. She was provided training by the firm (whether dictated by the city or not) and was required to follow the firm's rules, regulations, policies and procedures, and dress codes. She was required to be at work one hour and a half prior to her first appointment and be at the appointed station ten minutes prior to start time. The firm and the city determined the rates charged for the tours, not the worker. The firm had the financial investment in the horses and their care, and in the carriages, and provided the liability insurance. The fact the worker had to obtain her own tour guide license would not be deemed a financial investment but rather a tool of the trade, such as a license for nursing, electricians etc.