

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 provides chauffeured transportation. The worker was engaged by the firm as a driver. The firm did not withhold taxes from the worker's remuneration in 2017 and 2018.

The firm provided the agreement between the parties which states, among other things, that the firm will provide the worker all vehicles to conduct chauffeur services. All vehicles will be safe, serviceable, properly licensed, permitted, and insured. The worker will be required to inspect issued vehicles before, during, and after each use; discrepancies must be reported to the dispatcher upon discovery. The worker is responsible for refueling and the cleanliness of the vehicle; trash will be removed after each trip, windows and upholstery wiped down, and the entire interior vacuumed. Fuel will be paid or reimbursed by the firm. The worker is responsible for reporting to the firm any traffic violations or accidents that occur. He can be held liable for damage to any company vehicle that is found to be the result of negligence on the part of the worker, with a limit of \$500 or 50% of the deductible, whichever is higher. The worker is responsible for the purchase and maintenance of uniforms, and will be refused work that day if not adhering to the dress code. Uniforms will be comprised of a black suit, white shirt, black tie, and black shoes. Client unique chauffeur ties will be provided by the firm when required. The worker is required to possess a working cell phone when providing chauffeur services. The worker will be compensated for chauffeur services at a rate of 20% of the total fare, to be paid each month by the 5th day of following month. The worker agrees not to engage or compete in any business similar to that of the firm at any time under this contract, and for a period of three years and within a 300-mile radius of the firm's current area of authority after the termination of the contract.

Information from the parties supports that the firm relied upon the worker's prior training and experience to perform his services. It provided the worker his work assignments via phone or text; the worker could accept or reject the assignment. If problems or complaints occurred, the worker contacted the firm for resolution. The worker's daily routine was dependent upon the firm's customers. The worker was required to perform his services personally if he accepted the assignment.

The firm did not cover the worker under workers' compensation. Neither party indicated an investment by the worker in the firm or a related business.

The worker obtained his job through an application process. The firm did not make general benefits available to the worker. Although the above contract states that the worker was prohibited from performing similar services for others during the same time period, and for three years and within a 300-hundred mile radius after termination of the contract, the firm stated in its response that its drivers are allowed to drive for other firms but not for the firm's clients. The worker performed his services under the firm's name.

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, although the firm relied upon the worker's prior training and experience to perform his services, it was responsible for resolving any problems or complaints that may have occurred, 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 worker was required to perform his services personally, meaning that he could not engage and pay others to perform services for the firm on his behalf. 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. The worker furnished his uniform and utilized his personal cell phone. 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. The firm paid the worker on a commission basis. The opportunity for higher earnings or of gain or loss from a commission arrangement is not considered profit or loss. 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. He 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 chauffeured transportation 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 firm stated that 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 make benefits available to the worker, the firm terminated the work relationship with neither party incurring liability or penalty, a factor indicating 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.