

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

The worker submitted a request for a determination of worker status in regard to services performed for the firm as a shuttle bus driver. The services performed included transporting airline passengers to an international airport. The firm issued the worker Form 1099-MISC for 2017. The worker filed Form SS-8 as he believes he erroneously received Form 1099-MISC and he disputes the amount reported.

The firm's response states its business is providing daily round trip shuttle service for two airlines, i.e. one round trip per airline daily. The services performed by the worker included independently running the physical shuttle operations. The worker hired and managed drivers, in addition to maintaining all vehicles. He also drove when necessary. The worker was classified as an independent contractor as he ran operations with no oversight. The firm paid the worker a fixed per round trip amount and the worker paid the drivers an amount unknown to the firm. The firm had no contact with the two drivers hired by the worker.

The firm stated it did not train the worker. Assignments were the same every day. If there were any changes, the firm informed the worker. The worker determined the methods by which assignments were performed. The worker was responsible for dealing with customer issues. If he was unable to adequately resolve the problems, the firm was contacted. Reports and meetings were not required. Daily departures occurred at 7 am and 12 pm. The worker's daily routine was unknown; however, he ran the shuttle operations and set the drivers' schedules. The worker performed services from his home and over-the-road when driving. The worker was not personally required to perform services. The worker was responsible for hiring and paying substitutes or helpers. The worker stated the firm provided him specific training and/or instruction related to how to operate the shuttle service, report in a daily log, and report business expenses. The firm provided work assignments, determined the methods by which assignments were performed, and assumed responsibility for problem resolution. The firm required he complete various reports, i.e. daily log book, business expense report, vehicle maintenance and inspection report, and report on the number of passengers. He transported passengers daily. The firm required he attend meetings as scheduled. The firm required he personally perform services. The firm hired and paid substitutes or helpers.

The firm stated it provided three transportation vehicles. The worker provided his home office. The worker did not lease equipment, space, or a facility. The worker did not incur expenses in the performance of services for the firm as it reimbursed the worker for gas and parking fees. Customers paid the firm. The firm paid the worker a fixed rate of pay for each round trip. The worker kept and managed passenger tips. The firm did not carry workers' compensation insurance on the worker. The firm established the level of payment for the services provided. The worker stated the firm also provided a company credit card for gas and vehicle maintenance. He did not incur economic loss or financial risk.

The firm stated the work relationship could be terminated by either party without incurring liability or penalty. The worker performed similar services for others; the firm's approval was not required for him to do so. There was no agreement prohibiting competition between the parties. The worker did not advertise. The firm represented the worker as a contractor to its customers. Services were performed under the firm's business name. The work relationship ended when the worker quit. The worker stated the benefit of personal days was made available to him. He did not perform similar services for others. The firm represented him as its shuttle bus driver to its customers.

Analysis

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.

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 a contract 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. Furthermore, whether there is an employment relationship is a question of fact and not subject to negotiation between the parties.

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 services performed by the worker were integral to the firm's business operation. The firm provided work assignments by virtue of the customers served and it ultimately assumed responsibility for problem resolution. These facts evidence the firm retained the right to direct and control the worker to the extent necessary to ensure satisfactory job performance in a manner acceptable to the firm. Based on the worker's education, past work experience, and work ethic the firm may not have needed to frequently exercise its right to direct and control the worker; however, the facts evidence the firm retained the right to do so if needed.

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. As acknowledged by the firm, the worker did not invest capital or assume business risks. 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. Based on the fixed rate per round trip arrangement the worker could not realize a profit or incur a loss.

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 the firm's business. Both parties retained the right to terminate the work relationship at any time without incurring a liability. There is no evidence to suggest the worker performed similar services for others as an independent contractor or advertised business services to the general public during the term of this work relationship. The classification of a worker as an independent contractor should not be based primarily on the fact that a worker's services may be used on a temporary, part-time, or as-needed basis. As noted above, common law factors are considered when examining the worker classification issue.

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 firm can obtain additional information related to worker classification online at www.irs.gov; Publication 4341.