

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 driver for the firm in tax year 2017; however, the worker provided a copy of a 2018 Form 1099-MISC. The firm's business is described as airport transportation.

The firm's response was signed by the owner. The firm's business is a licensed and insured livery service, providing transportation to and from the airport and other regional airports. The worker provided services as a driver. In a follow-up conversation, the firm stated there was no written agreement; he told the worker upfront he was an Independent Contractor and he would be getting a 1099-MISC and would be responsible for his taxes.

The firm and worker acknowledge the worker was provided the instructions as to a job assignments of transporting specific individuals to specific locations via the firm-supplied mobile app or via text. The firm determined the methods by which the worker's services were performed; and, any problems or complaints encountered by the worker were directed to the firm for resolution. There was no set schedule; the firm's owner stated that he drove 90% of the trips, with the worker serving as a back-up driver or replacement in the firm's absence, if the worker was available. The worker was required to perform the services personally; any additional personnel were hired and paid by the firm.

Both parties concur that the firm provided a vehicle, gasoline, tolls, repairs, and insurance. The worker did not lease equipment, space, or a facility. The worker was paid per trip and was reimbursed for gas, tolls, and the occasional use of his vehicle. The customers paid the firm and worker using credit card software provided by the firm; and the receipt was issued to the customer via text or email. If the worker was paid cash the entire amount was turned over the firm. 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 worker did not establish level of payment for services provided, the firm did.

The firm and worker agree that there were no benefits extended to the worker and that either party could terminate the work relationship without incurring a liability or penalty. The worker was performing same or similar services for others during the same time frame. The worker was issued a company badge and was referred to as a representative of the firm.

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 business activities.

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 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 written) between the parties.

We have considered the information provided by both parties and have applied the above law 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.