

SS-8 Determination—Determination for Public Inspection

Occupation 09DVC Shuttle 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 shuttle driver in tax years 2017 to 2018, for which he received Form 1099-MISC. The worker had been issued Form W-2 for the same services in tax years 2012 to 2016. There were significant changes to the work relationship other than how worker was compensated. The firm's business is described as an automotive restyler.

The firm's response was signed by the CFO. The firm's business is upgrades and restyling services for automobiles, including servicing interior and exterior components. The worker provided services as a driver between dealerships and the firm's location. The firm stated the worker had been treated as an employee for tax years 2013 to 2016; but, the driver position was reclassified to an independent contractor status to reflect the economic realities.

The worker indicated he had been given in-house training and instructions as to how the job was to be done. The job assignments from the firm were via phone/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. The worker was required to turn in trip logs and delivery sheets. The worker was contacted as needed. He went to the shop to get the paperwork and vehicle, he would pick up or deliver the assignment, return to shop to return keys, tags and chase car, and complete the log. The firm's location was the base to start and finish each trip and usually there were multiple trips in the day. The worker was required to perform the services personally; any additional personnel were hired and paid by the firm.

The firm responded that there was no specific training and instruction provided aside from the driver orientation at the onset/beginning of the relationship. The drivers are contacted for job assignments on a rotational basis; they can accept or decline. The worker determined the methods by which he performed his job. Any problems or complaints, which were rarely encountered by the worker, were directed to the firm's shop manager for resolution. There was no set schedule or routine for services rendered as no two assignments were the same and drivers could elect to accept or decline a trip. The worker was not required to perform the services personally; any additional personnel were hired and paid by the worker.

The firm provided the forms, chase car, fuel, and expenses including AAA and credit card for fuel. The worker furnished his services and there were no out-of-pocket expenses. The worker did not lease equipment, space, or a facility. The worker was paid mileage; the customers paid the firm. The worker was at risk for a financial loss in this work relationship if he lost the tags, etc; The worker did not establish the level of payment for services provided.

The firm acknowledged the firm provided a vehicle or the customer's vehicle. The worker furnished nothing; but, he could incur expenses for meals and lodging. The worker did not lease equipment, space, or a facility. The worker was paid mileage. The customers paid the firm. The worker was covered under the firm's workers' compensation insurance policy. The firm stated the worker was at risk for a financial loss in this work relationship if an accident resulted; the worker would be responsible for expenses including deductible. The firm indicated the worker did establish level of payment for services provided. The firm paid based on mileage and the worker and others requested and received additional money.

Both parties concur there were no benefits extended to the worker. Either party could terminate the work relationship without incurring a liability or penalty. The firm stated the worker was performing same or similar services for others during the same time frame; the worker disagreed.

The firm provided a copy of the memo regarding driver pay raise and status change which stated the drivers will still have access to a corporate fuel card, AAA, transport tags, use of company-owned autos, and reimbursements, as well as being covered under the property, casualty and garage keepers, liability, and worker's compensation insurances while performing. The memo also provided an explanation/breakdown of payments for services.

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.

Training a worker by requiring an experienced employee to work with the worker, by corresponding with the worker, by requiring the worker to attend meetings, or by using other methods, indicates that the person or persons for whom the services are performed want the services performed in a particular method or manner. This is true even if the training was only given once at the beginning of the work relationship.

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.

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 statement that the worker was an independent contractor 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 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.