

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 initiated the request for a determination of his work status as a dump truck driver in tax years 2018 to 2019, for which he received Form 1099-MISC. The firm's business is described as a dump truck company.

The firm's response signed by the president, describes the business as a 10-wheeler truck used to haul dirt, sand, rock, gravel, asphalt, and concrete for contractors and/or property owners. The worker answered an ad for the job. The worker provided services as a truck driver driving from his home to the job site.

The worker indicated there was no specific training and/or instructions given. He received the job assignments via text messages. 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's services were rendered whenever there were loads. He stated he was not responsible for soliciting customers. The worker was required to perform the services personally; any additional personnel were hired and paid by the firm.

The firm responded that no training and/or instructions were provided. The job assignments came from the firm, other businesses, brokers, word of mouth, and contractors. The worker was responsible for soliciting work/customers and texted the firm regularly throughout the day as to jobs secured/worked. The worker determined the methods by which the services were performed. Any problems or complaints encountered by the worker were handled by the worker or if necessary directed to the firm for resolution. The worker tracked hours on the jobsite and would text the firm for billing and/or payment; services were rendered at various construction sites. The worker was not required to perform the services personally; any additional personnel were hired by the worker and paid by the firm.

The worker stated the firm provided the truck, fuel, tools, and truck parts and services. The worker furnished nothing and any expenses paid by the worker were reimbursed by the firm. The worker did not lease equipment, space, or a facility. The customers paid the firm; the firm paid the worker an hourly wage. The worker indicated he was covered under the firm's workers' compensation insurance policy. The worker did not indicate he was at risk for an economic loss in this work arrangement. The worker did not establish the level of payment for the services provided.

The firm acknowledged providing the truck and a fuel bank card. The firm responded the worker furnished the driving, maintenance on the truck, and fuel replacement; and he was reimbursed for fuel, parts, maintenance and/or repairs. The worker did not lease equipment, space or a facility. The worker tracked his time for driving and any parts, maintenance/repairs and was paid. The customers paid the firm. The worker was not covered under the firm's workers' compensation insurance policy. The firm indicated the worker was at risk for a financial loss in this work relationship if he didn't work he didn't get paid. The worker did establish level of payment for services provided.

Both parties concur there were no benefits extended to the worker and that 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. They agreed the worker resigned his position.

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.

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.

A requirement that the worker submit regular or written reports to the person or persons for whom the services are performed indicates a degree of control.

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 activities.

The fact that the person or persons for whom the services are performed furnish significant tools, materials, and other equipment tends to show the existence of an employer-employee relationship.

Lack of significant investment by a person in facilities or equipment used in performing services for another indicates dependence on the employer and, accordingly, the existence of an employer-employee relationship. 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. Also, if the firm has the right to control the equipment, it is unlikely the worker had an investment in facilities.

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 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 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

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.