

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 worker submitted a request for a determination of worker status in regard to services performed for the firm from January 2018 to December 2018 as a delivery driver. The worker was not issued a 1099-misc for 2018 as they earned less than \$600. The worker provided copies of their paychecks from the firm. The worker filed Form SS-8 as they did not receive a form W-2 from the firm. There was no written agreement between the parties.

The firm's response states it is a non-profit delivery service for the elderly and disabled. The work provided by the worker was grocery delivery. The worker was requested to deliver food to elderly and disabled individuals. The firm states that they provided simple instruction at training to the worker.

The firm states that the worker was given instruction at the time of the interview. The worker would receive delivery job assignments on paper by the firm's delivery scheduler. The director of the firm determined the methods by which job assignments were performed. If problems or complaints arose during job duties, the worker was required to contact the firm's administrative assistant for problem resolution. There were no reports required from the worker. The worker provided delivery services for the firm for a few hours each Wednesday. The worker's location of service varied depending upon their delivery schedule. The worker was required to perform all services personally. If helpers or substitutes were required, the firm's director was responsible for hiring and paying the additional help. The worker states that the firm's manager was responsible for determining the methods by which jobs were performed as well as assuming responsibility for problem resolution. The worker performed services at the firm's premises and customer locations for approximately 30 minutes for each delivery.

The firm states that no supplies, materials, or equipment were applicable to the situation. The worker did not have to lease space, facilities or equipment for their job duties. The worker did not incur any expenses during the performance of their job duties. The worker was paid on a piece work, volunteer basis. The worker was not allowed access to a drawing account for advances. The firm did not carry worker's compensation insurance on the worker. The worker did not have any exposure to economic loss or financial risk. The director of the firm set the level of payment for all services rendered. The worker states that the firm provided delivery bags and food, and the worker provided their car for transportation. The worker incurred gasoline expenses for their delivery job. The worker states that the services offered by the firm were charitable and there was no charge to any customers of the firm. The worker's only economic loss exposure involved the possibility of getting into an automobile accident while performing delivery services.

The firm did not offer the worker any benefits. The relationship could be terminated by either party without loss or liability. The worker did not perform similar services for any other firm. The worker was not a member of a union and did not advertise their services to the public. The worker states that there was no agreement prohibiting competition between the parties. The worker was represented as an employee of the firm. The work relationship is ongoing.

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, a statement that a worker is an independent contractor pursuant to a written or verbal 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.

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. In this case, the firm required the worker to personally perform services. Furthermore, the services performed by the worker were integral to the firm's business operation of delivery. The firm provided work assignments by virtue of the customers served and 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.

Payment by the hour, day, 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. In this case, 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 lump sum rate of pay 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.