

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 from September 2017 to March 2018 as a truck driver. The firm issued the worker Form 1099-MISC for 2017 and 2018. The worker filed Form SS-8 as they believe they received Form 1099-MISC in error. There was a contract provided by the firm between the two parties. The worker believes they were an employee of the firm because they had no control or say in the job duties and they could not take the vehicle they leased from the firm to provide services elsewhere.

The firm's response states it is a transportation company transporting grapes and cement powder. The work provided by the worker was that of a driver. The worker was requested to transport grapes, cans and cement powder. The firm states that they classified the worker as an independent contractor because they did not dictate the worker's schedule and the worker could turn down any offer of work they were provided. The firm provided a lease agreement between the firm and the worker regarding the truck that was used for transportation, and also an independent contractor contract between the firm and the worker.

The firm states that the worker was able to choose to work or decline jobs that were offered by the firm for next day transportation. The deliveries were set by another company for the worker to choose from, and work opportunities were provided by email, text, or phone call. The firm states that the third-party company providing the deliveries determined the methods by which job duties were performed. If the worker encountered problems or complaints during their job duties, they were required to contact the dispatch office of the delivery company from which they chose work. The worker was required to provide delivery slips to the firm. The worker's schedule was determined by the deliveries that they accepted to transport. The worker would pick up and drop off the truck and trailer at the firm's premises and leave to perform their delivery duties. The worker was not required to attend any meetings or perform any services personally. However, the firm's contract with the worker prohibits the worker from assigning any work to anyone other than the worker themselves without written consent of the firm. The firm would not pay for substitutes or helpers if needed. The worker states that they were given a dispatch schedule every morning by email from the firm's owner, and they did not have any personal contact with the delivery companies. The worker states that if there were any problems or complaints during job duties, they were required to contact the firm's owner. The worker states that they would perform 13 to 14 hour work days and that they would be emailed their schedule for deliveries the previous day. The worker's truck was provided by the firm and parked on the firm's premises. The worker states that they did not have to attend any meetings but that they did have to provide all services personally. If helpers or substitutes were required, the firm's owner would hire and pay for the assistants.

The firm states that they provided the worker with a truck for their duties. The worker had to provide safety equipment, flashlight, and paper and pen. The firm states that third parties provided the trailer and deliveries for the job responsibilities. The worker had to lease payment of the truck from the firm in order to complete their job responsibilities. The firm provided a lease agreement demonstrating this and a contract showing that the lease payment was deducted from the worker's compensation. The worker incurred the expenses of leasing equipment and fuel. The worker was paid on a piece work basis and did not have access to a drawing account for advances. The customer would pay the firm for all services rendered by the worker. The firm did not carry worker's compensation insurance on the worker. The firm states that the worker did not have any exposure to financial risk or economic loss during their job responsibilities. The firm states that the third party providing the delivery goods was responsible for setting the level of payment for services rendered. The worker states that the firm provided the truck and the trailer, fuel and maintenance for the truck, and clothing with the firm's name on it. The worker states that they did not have to lease space, equipment or facilities. The worker states that the truck lease made it clear that the truck could not be used at the worker's discretion and had to be used only for purposes of working for the firm. The worker states they were paid a commission percentage of the loads they delivered. Customers would pay the firm for all deliveries. The worker did not establish the level of payment for services rendered.

The firm states that they did not provide any benefits to the worker. The worker did not perform similar services for any other firm at the time they worked for the firm. There were no agreements in place prohibiting competition between the worker and the firm. The worker was not a member of a union and did not advertise their services to the public. The firm represented the worker to their clients as an independent contractor. The firm states that the work relationship ended when the worker quit. The worker states that there were no benefits offered to them. The work relationship could be terminated at any time without incurring loss or liability. The worker did not perform similar services for any other firm at the time they worked for the firm. The worker was required to provide all finished products and equipment to the firm. The worker did not advertise their services to the public. The worker states that they were represented by the firm as an employee of the firm. The work relationship ended when the worker quit.

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, co-adventurer, 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 providing deliveries. The firm provided work assignments by virtue of the deliveries required and customers served, required the worker to report on services performed through delivery slips, 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 beyond the lease of a vehicle that the firm deducted from paychecks provided to the worker. The worker was unable to provide services with the provided "leased" truck beyond deliveries that were provided to the worker as job opportunities by the firm. 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 piecework 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.