

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

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Facts of Case

The worker initiated the request for a determination of his work status as a truck driver in tax years 2017 to 2019, for which he received Form 1099-MISC. He continues to provide services in 2020. The firm's business is described as operating dump trucks.

The firm's response, signed by the owner, indicates the firm's business is trucking transportation. The worker provides services as a driver (driving trucks) delivering sand and stone.

The worker stated he was not given specific training and instructions since he has 20 years experience and the previous owners had trained him on equipment and procedures. The job assignments are dispatched to locations within the state. The firm determines the methods by which the worker's services are performed. Any problems or complaints encountered by the worker are directed to the firm for resolution. The worker's services are rendered as early as 5am to 7 pm, five or six days a week. The worker picks up the dump truck from the firm, goes to quarry, and then delivers the load to a specified location as directed. The worker is required to perform the services personally; any additional personnel are hired and paid by the firm.

According to the firm's response, there are no trainings and instructions given. The job assignments go through dispatch; and, it is the dispatcher that determines the methods by which the worker's services are performed. The worker notifies the firm of any problems or complaints encountered that require resolution. The worker's schedule is on a day-to-day basis on the road. The worker is not required to perform the services personally.

The firm and worker acknowledge the firm provides the dump truck, fuel comes from a tank at the yard, and tolls are through EZpass. The worker furnished nothing and he does not lease equipment, space, or a facility. The worker is paid a percentage of the load. The customers pay the firm. The firm indicated the worker is not covered under the firm's workers' compensation insurance policy. The worker stated he is not at risk for a financial loss in this work relationship. The firm establishes the level of payment for services provided.

Both parties concur there are no benefits extended to the worker and that either party could terminate the work relationship without incurring a liability or penalty. The worker is not performing same or similar services for others during the same time frame.

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.

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.

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.

We have considered the information provided by both parties to this work relationship. In this case, the firm retains 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 are met. The worker is not operating a separate and distinct business; the worker does not invest capital or assume business risks, and therefore, does 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 is not engaged in an independent enterprise, but rather the services performed by the worker are a necessary and integral part of the firm's business.

CONCLUSION

We conclude that the firm has the right to exercise direction and control over the worker to the degree necessary to establish that the worker is a common law employee, and not an independent contractor operating a trade or business.

Please see www.irs.gov for more information including Publication 4341 Information Guide for Employers Filing Form 941 or Form 944 Frequently Asked Questions about the Reclassification of Workers as Employees and Publication 15 (Circular E) Employer's Tax Guide.