

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 March 2019 to February 2020 as a truck driver. The services performed included picking up loads and driving them long distance. The firm issued the worker Form 1099-MISC for 2019; a copy of the 2020 tax reporting document was not provided for our review. The worker filed Form SS-8 as he believes he received Form 1099-MISC in error.

The firm's response states its business is the transportation of general goods. The worker was engaged as a truck driver. The services performed included hauling general goods. The worker was classified as an independent contractor as he chose his own schedule and decided on the number of loads he would haul weekly. The worker was made aware he would be receiving Form 1099-MISC. There was no written agreement between the parties. The worker verbally communicated the days he wanted to work and the firm accommodated the loads.

The firm stated that as the worker was an experienced driver, it did not provide training to the worker. Work assignments were communicated to the worker via text message. If the worker needed further assistance, he would call dispatch. If problems or complaints arose, the firm was contacted for resolution. If the firm was unable to resolve the issue, it contacted the broker/shipper. The worker was tracked via an electronic logging device and he turned in the bills of lading at the end of every week. The firm required the worker to report to dispatch when he was loaded/unloaded. Based on a payment report provided by the firm, the worker performed services on a regular, recurring basis. The firm required the worker to personally perform services. Substitutes or helpers were not applicable. The worker stated the firm trained him on how to log trips and electronically log. The firm determined the methods by which assignments were performed. The firm also required him to photograph a label upon pick up and delivery, which was sent to the firm via text message.

The firm stated it provided the electronic logging device. The worker provided and incurred the unreimbursed expenses associated with a fridge, GPS, radio, mattress, and minor tools. The worker did not lease equipment, space, or a facility. Customers paid the firm. The firm paid the worker per load completed. It allowed the worker a fixed weekly draw for advances. The firm did not carry workers' compensation insurance on the worker. The worker could incur a loss if the truck broke down and he was unable to work. Brokers provided the loads which established the level of payment for the services provided. The worker stated the firm provided all equipment. He could have used the firm's fuel card for advances; however, he never did. He did not incur economic loss or financial risk.

The firm stated benefits were not applicable. The work relationship could be terminated by either party without incurring liability or penalty. The worker did not perform similar services for others or advertise. There was no agreement prohibiting competition between the parties. The firm represented the worker as a truck driver to its customers. Services were performed under the firm's business name. The work relationship ended when the worker quit. The worker stated the benefit of birthday and Christmas bonuses was made available.

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, the firm's statement that the worker was an independent contractor pursuant to a 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 truck driving services performed by the worker were integral to the firm's business operation. The firm provided work assignments by virtue of the customers served, required the worker to report to dispatch, 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.

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. 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 per load 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.