

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 is seeking a determination of worker classification for service performed as a manager/driver for the firm from July 2018 until December 2019. The worker received a 1099-MISC from the firm for 2018 and 2019. The worker states that they were misclassified by the firm as an independent contractor because they were required to use the firm's vehicles to complete their job duties and to follow the firm's schedule. The worker included a copy of an email exchange between the parties, reservation records, and schedules for our consideration.

The firm states that it is a contracted ground transportation service for airlines. The worker had a transportation company providing services for other firms. The worker contacted the firm seeking to contract with them and to provide transportation services. The firm classified the worker as an independent contractor because the worker owned their own company providing similar services for other firms. The firm provided a copy of a written contract between the parties.

The firm states that the worker received initial training from the firm owner. The worker received a monthly schedule and could pick which trips they wanted. The worker determined the methods by which job assignments were performed. If the worker encountered any problems or complaints while working, they were required to contact the firm's president, but the worker was typically responsible for problem resolution. The worker was required to fill out an app process upon completion of each trip in order to be paid. The worker determined their own hours and routine. The worker performed all services from their home. There were no meetings required and the worker was not required to perform services personally. The worker was responsible for hiring and paying any helpers they needed. The worker states that the firm owner drove the worker on 2 runs and briefly gave an overview of the firm's operations. The firm owner gave the worker a monthly schedule by email, as well as daily emails and phone calls directly from airlines and third-party companies for updates and add-ons to their given schedule. The firm owner determined the methods by which job assignments were performed. The firm owner was responsible for all problem resolution. The worker was required to provide the firm with emails detailing any changes to their schedule. The worker would be on call 24 hours a day to answer phone calls and complete all transportation runs. The worker used the firm's vehicle to perform services. The worker would meet with the firm owner whenever they were in town and did not have to perform services personally. The firm owner required approval before the worker could hire any assistants. The worker was responsible for paying all helpers needed and was not reimbursed by the firm.

The firm states that they provided a vehicle for job duties on some occasions, and the worker provided all supplies necessary. The worker did not lease any space, facilities, or equipment. The worker incurred no expenses. The firm reimbursed the worker for any major vehicle expenses. The worker was paid on a per-trip basis. The worker did not have access to a drawing account for advances. Customers paid the firm for services provided. The firm did not carry worker's compensation insurance on the worker. The worker faced no economic loss or financial risk. The worker established the rate for services performed. The worker states that the firm provided schedules and vehicles. The worker provided a cell phone and fuel. The worker did not lease any space, facilities, or equipment. The worker's expenses included fuel, vehicle maintenance, their cell phone plan, and car washes. The firm did not reimburse the worker for any expenses. The worker was paid on a per-run basis. Customers paid the firm for services provided. The worker's financial risk included their personal tools. The worker did not establish the level of payment for services provided.

The firm states that the relationship between the parties could be terminated by either party without liability or penalty. The worker performed similar services for other firms and did not need approval from the firm to do so. There were no non-compete agreements in place between the parties. The worker was not a member of a union. The firm was unaware of any advertising the worker may have done. The firm represented the worker as a contractor. The worker abandoned their position without notice. The worker states that there were no benefits available. The relationship between the parties could be terminated by either party without liability or penalty. The worker did not perform similar services for other firms. There were no non-compete agreements in place between the parties. The worker was represented by the firm as a manager and representative performing services under the firm's name. An email from the firm (provided by the worker) shows that there was a uniform required to be worn by the worker bearing the firm's name. The worker ended the work relationship when the firm refused to hire anyone to help the worker.

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 services performed by the worker were integral to the firm's business operation of airline crew transportation. The firm provided work assignments by virtue of the customers served, required the worker to report on services performed through an application and email, and assumed responsibility for problem resolution. The firm's website includes a handbook with driver guidelines and procedures, including dress code and attendance policies, specifically aimed at workers performing the same job duties as the worker. 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 firm provided all vehicles necessary for the worker's job duties, and the worker did not have any major expenses. The worker did not have any exposure to financial risk or liability. 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-trip 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. The worker was required to wear a uniform bearing the firm's name while performing services. 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 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.