

SS-8 Determination—Determination for Public Inspection

Occupation Delivery/Transportation	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 is seeking a determination of worker classification for service performed as a truck driver from the firm from November 2018 until January 2020. The worker received a 1099-MISC from the firm for 2018 and 2019. The worker feels that they were misclassified as an independent contractor because the firm owner took care of all job-related expenses, provided the truck for the job duties, and dispatched the loads. There were no written agreements between the parties.

The firm states that they provide freight transportation. The firm owner provided the worker with a truck and trailer, and the worker was requested to drive the truck and deliver various loads. The firm states that they feel the worker was an independent contractor because the worker determined how often they wanted to work and how much they wanted to make. The firm states that the worker also set their own hours and drove for other firms.

The firm states that they did not provide the worker with any training. The worker would choose their own loads and schedule themselves. The worker would determine the methods by which job duties were accomplished and the worker handled all problems encountered on the road themselves. There were no reports required of the worker, and the worker's schedule involved them scheduling their own loads and then driving. The worker performed all services on the road. The firm states that there were no meetings required and the worker was required to perform services personally. The worker states that the firm's dispatch assigned the worker job duties and determined the methods by which they were performed. If the worker encountered any problems or complaints while working, they were required to contact the firm's dispatch for problem resolution. The worker was required to complete an Elog and provide the firm with bills of lading and expense receipts. The worker's daily routine involved getting the load dispatch, going to pick up the load, driving to destination (up to 14 hours of drive time with one break), and delivering the load. The worker would perform services around 70 hours a week. The worker delivered loads all over the continental United States. There were no meetings required and the worker was required to perform services personally. Helpers and substitutes were not applicable.

The firm states that it provided a truck and trailer, and the worker did not provide anything. The worker did not have to lease any space, facilities, or equipment. The worker incurred expenses of food, clothing, and their phone. The worker was paid a percentage of the load haul cost. Customers paid the firm for services provided. The firm did not carry worker's compensation insurance on the worker. The firm states that the worker determined the level of payment for services provided. The worker states that the firm provided the truck, trailer, fuel, oil, all equipment, and truck maintenance. The worker did not provide or lease anything for their job duties. The worker incurred no expenses during their job duties. The worker was paid a set percentage rate for each load delivered and was allowed daily access to a drawing account up to a maximum set amount. Customers paid the firm. The worker had no exposure to economic loss or financial risk. The worker states that the broker for the loads set the level of payment for services.

The firm states that they did not provide the worker with any benefits. The relationship between the parties could be terminated by either party without liability or penalty. The firm states that the worker performed similar services for other firms during the work relationship 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 and did not advertise their services to the public. The work relationship ended when the worker quit and stated that they wanted to work for a different firm. The worker states that they did not perform similar services for other firms. The worker states that they did not advertise their service to the public. The worker was unaware of how the firm represented 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, 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. The firm provided work assignments by virtue of the customers served, required the worker to report on services performed, 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 percentage 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.