

SS-8 Determination—Determination for Public Inspection

Occupation

Delivery/Transportation

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 firm offers same day time critical, on-demand delivery services 24 hours a day, seven days a week to commercial and government entities throughout all major metropolitan areas. Same day delivery service applies but is not limited to packages, documents, furniture, live animals, biological material, and laboratory equipment. The deliveries can be made across the street, across the town, from city to city, and state to state. They also provide multiple levels of service, depending on customer requirements and can also arrange next available flight services around the world. The firm is an entity that engaged the worker as a delivery service driver from 2013 to 2016. The firm believed the treatment of the worker as an independent contractor was correct as he was able to choose the jobs that he accepted from them.

The worker submitted a Form SS-8 after receiving a Form 1099-Misc from the firm. The firm replied with a Form SS-8.

The worker completed an application for the job. He stated that he received orientation over the phone regarding the expectations of him from the firm. The firm asserted the worker rode along with other workers for training purposes. The worker claimed that his supervisor would call dispatch to get orders. He would then get drivers, like the worker, out on routes for them to accomplish their tasks. He would accept jobs through an app on his phone by pressing the "commit" button. According to the worker, his supervisor determined the methods by which the assignments were performed. His supervisor determined the routes and details of his tasks. He also asserted the supervisor had the right to terminate the employee if he refused. The firm maintained that it was the firm's customers that set these standards. The worker was required to log time of pick up/drop off, location and details of all the deliveries that were made. He also was required to obtain signatures from the firm's customers for all deliveries. Both parties agree the firm was responsible for problem resolution. The worker describes his schedule Monday-Friday, typically anytime from 6:00am-8:00pm. He stated that he would sometimes spend 17 hours a day driving. He asserted that the firm expected him to be on call 24 hours a day. For example, the worker told the firm he needed the day off for his daughter's graduation. He was still called to go make a delivery for the firm. The firm stipulated that the workers schedule varied. His schedule would depend on what jobs he chose to accept from the firm. The worker received regular weekly remuneration for his services at a set rate of at least \$600. He performed the services on the premises of the firm's customers. The worker was not required to attend daily meetings. The relationship between the parties was continuous, as opposed to a one-time transaction. The nature of this relationship contemplated that the worker would perform the services personally. The worker worked exclusively and on a continuing basis for the firm. His services were an integral and necessary part of the services the firm provided to its customers. The firm would hire and pay any substitutes or helpers.

According to the worker at the beginning of the work relationship the firm provide him with a truck to drive. When the firm needed the truck for other drivers, he was required to drive his own. The firm maintained that it only provided the worker with an ID but would sometimes reimburse the worker if he had paid exceptionally high tolls. The firm determined the fees to be charged. The worker was paid weekly a wage of \$600. The firm stated the worker would get a percentage of each job that he accepted. The worker did not lease equipment. The firm did not allow the worker a drawing account, or advances against anticipated earnings. The firm's customers paid the firm. The firm did not carry worker's compensation insurance on the worker. The firm established the level of payment for the services provided. The worker did not have a substantial investment in equipment or facilities used in the work and did not assume the usual business risks of an independent enterprise.

The worker was not eligible for sick pay, vacation pay, health insurance, or bonuses. Either party could terminate the worker's services at any time without incurring a penalty or liability. The worker was not a member of a union. All work produced became the property of the firm's customers. According to internal research, the worker did not perform the services for others. He did not advertise his services to the public. He did not maintain an office, shop, or other place of business. He was required to perform the services under the name of the firm and for the firm's customers. The relationship between the parties has ended when the firm terminated the worker. The firm stated the worker gave false information regarding a delivery. They stopped calling him for jobs. Meanwhile the worker contended he was let go because he got a flat tire on his own vehicle. He used a relative's car to do the delivery and the firm disapproved of his decision.

Analysis

In determining whether an individual is an employee or an independent contractor under the common law, all evidence of both control and lack of control or independence must be considered. We must examine the relationship of the worker and the business. We consider facts that show a right to direct or control how the worker performs the specific tasks for which he or she is hired, who controls the financial aspects of the worker's activities, and how the parties perceive their relationship. The degree of importance of each factor varies depending on the occupation and the context in which the services are performed.

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.

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.

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.

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.

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.

Usually, independent contractors advertise their services and incur expenses for doing so. In this case, the worker not only did not advertise his services, he filled out an application for a job. This is a strong indicator that the worker is not an independent contractor.

Based on the common-law principles, the firm had the right to direct and control the worker. The worker shall be found to be an employee for Federal tax purposes.

The firm can obtain additional information related to worker classification online at www.irs.gov; Publication 4341