

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 services performed as a truck driver for the firm from September 2017 until June 2020. The worker received a 1099-MISC from the firm for 2017 through 2019, and a 1099-NEC from the firm for 2020. The worker states that the firm misclassified the worker as an independent contractor because the firm told them when to work, the worker had to request time off, the worker could not pick their loads, and they were treated by an employee by the firm. There were no written agreements between the parties.

The firm states that it is trucking and transportation company. The worker was requested to provide services for the firm as a truck driver. The worker was classified by the firm as an independent contractor because they earned a percentage of their gross loads hauled for the firm.

The firm states that the worker as instructed to haul daily feed loads. The worker received job assignments through phone calls. The firm 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 for problem resolution. The worker was required to provide the firm with daily mileage sheets and load sheets. The worker performed services from 6am until 6pm, depending upon the time of the year. The worker performed services at customer locations. There were no meetings required and the worker was not required to perform services personally. Helpers and substitutes were not applicable. The worker states that the firm trained the worker on how to operate equipment, instructed the worker on what routes to take, and also instructed the worker on who gets what loads from the truck. The ethanol plant where the feed hauled came from would contact the firm or the workers and the workers would have to split the loads. The firm owner would determine the methods by which job assignments were performed and assume responsibility for problem resolution. The worker provided the firm with mileage logs and load tickets. The worker usually performed services 12 to 16 hours daily. Even if work was slow, the worker was required to report to work. The worker drove the firm's truck throughout the state and neighboring states delivering loads for 12 or more hours a day. No meetings were required, and the worker was required to perform services personally. The firm was responsible for hiring and paying all helpers needed. The worker was not allowed to hire any substitutes.

The firm states that they provided a truck, a trailer, and a Garmin. The worker did not provide or lease anything. The worker incurred no expenses during their job duties. The worker was paid a commission percentage of each load hauled. The worker did not have access to a drawing account for advances. Customers paid the firm for services and products provided. The firm did not carry worker's compensation insurance on the worker. The worker faced no economic loss or financial risk. The worker did not establish the level of payment for services provided. The worker states that the firm provided a truck, trailer, fuel, tools, parts, and loads. The worker provided their own GPS, pens, and lunch. The worker did not lease anything, and their only expense was their lunch. The firm would reimburse the worker for any parts that were purchased for job duties. The worker was paid a percentage of each load. On occasion, the firm would provide the worker with a cash advance, to be repaid at a later date. Customers paid the firm. On occasion, the worker would receive a check to give to the firm from customers. The worker's wages were garnished as a result of a fine for an overweight load. The firm established the level of payment or services provided.

The firm states that they provided the worker with personal days as a benefit. 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 not a member of a union and did not advertise their services to the public. The worker was not represented by the firm. The firm terminated the worker's job with the firm and ended the work relationship. The worker states that they were provided with bonuses by the firm. The worker did not perform similar services for other firms and would need the approval of the firm in order to do so. The worker was not allowed to provide services to the customers of the firm upon termination of the work relationship. The worker was represented by the firm as a trucker performing services under the firm's name. The worker was terminated by the firm for requesting a weekend off.

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 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 through mileage logs and load tickets, and assumed responsibility for problem resolution. The worker was trained on the daily job duties and was not allowed to deviate from their provided schedule without authorization from the firm. 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 equipment, materials, and supplies necessary for the job duties. 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 of delivering loads to customers. 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.