

SS-8 Determination—Determination for Public Inspection

Occupation

03TRA Tradespersons

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 initiated the request for a determination of his work status as a carpenter in tax years 2018 to 2019, for which he received Form 1099-MISC. The firm's business is described as carpentry/construction.

The firm's response, signed by the owner, is a general contractor; and, the worker provided services as an independent contractor performing home repair and maintenance.

The worker indicated he was given training and instructions from the firm. The job assignments were given verbally everyday; and, it was the firm that determined the methods by which the worker's services were performed. Any problems or complaints encountered by the worker were directed to the firm or project manager for resolution. The worker's services were rendered primarily from 8am to 4:30pm at the customer's location, with 1% of the time at the firm's shop/home. The worker was not required to perform the services personally; any additional personnel were hired and paid by the firm.

According to the firm, there was no training and/or instructions given to the worker. The job assignments were disseminated by the site manager. The worker determined the methods by which the worker's services were performed; however, any problems or complaints encountered by the worker were directed to the manager for resolution. The services were rendered Monday through Friday from when the worker showed up until he left, at the customer's location. The worker was not required to perform the services personally; any additional personnel were hired and paid by the firm.

The worker stated the firm provided supplies, equipment, and materials. The worker furnished nothing, did not lease equipment, space, or a facility, and he did not incur expenses in the performance of his job. The firm paid the worker an hourly wage; the customers paid the firm. The worker was not covered under the firm's workers' compensation insurance policy; and, indicated he was at risk for a financial loss in this work relationship if he was hurt on the job. The firm established the level of payment for services provided and/or products sold.

The firm responded that the materials and supplies were provided by the firm; and, the worker furnished tools, installation, and auto expense. The worker was allowed advances but only for the purchase of materials. The worker did not lease equipment, space, or a facility. The worker incurred expenses for auto, meals, and tools. The worker was paid an hourly wage; with the customers paying the firm. The worker was not covered under the firm's workers' compensation insurance policy. The firm indicated the worker was not at risk for a financial loss in this work relationship. The worker did not establish level of payment for services provided and/or products sold - the owner/manager did.

Both parties concur there were no benefits extended to the worker and that either party could terminate the work relationship without incurring a liability or penalty. The worker was not performing same or similar services for others during the same time frame. The worker indicated he was laid off, then quit.

The firm provided a copy of the Independent Contractor Non-disclosure Agreement signed 12/11/2018, which addressed non-disclosure and the confidentiality of the firm's business information.

Analysis

A worker who is required to comply with another person's instructions about when, where, and how he or she is to work is ordinarily an employee. This control factor is present if the person or persons for whom the services are performed have the right to require compliance with instructions. Some employees may work without receiving instructions because they are highly proficient and conscientious workers or because the duties are so simple or familiar to them. Furthermore, the instructions, that show how to reach the desired results, may have been oral and given only once at the beginning of the relationship.

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.

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.

The fact that the person or persons for whom the services are performed furnish significant tools, materials, and other equipment tends to show the existence of an employer-employee relationship.

Lack of significant investment by a person in facilities or equipment used in performing services for another indicates dependence on the employer and, accordingly, the existence of an employer-employee relationship. 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. Also, if the firm has the right to control the equipment, it is unlikely the worker had an investment in facilities.

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.

The firm's statement that the worker was an independent contractor pursuant to an 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.

We have considered the information provided by both parties to this work relationship. In this case, the firm retained the right to change the worker's methods and to direct the worker to the extent necessary to protect its financial investment and business reputation and to ensure its customers' satisfaction and that its contractual obligations were met. The worker was not operating a separate and distinct business; the worker did not invest capital or assume business risks, and therefore, did not have the opportunity to realize a profit or incur a loss as a result of the services provided. Integration of the worker's services into the business operations generally shows that the worker is subject to direction and control. When the success or continuation of a business depends to an appreciable degree upon the performance of certain services, the workers who perform those services must necessarily be subject to a certain amount of control by the owner of the business. 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.

CONCLUSION

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.

Please see www.irs.gov for more information including Publication 4341 Information Guide for Employers Filing Form 941 or Form 944 Frequently Asked Questions about the Reclassification of Workers as Employees and Publication 15 (Circular E) Employer's Tax Guide.