

SS-8 Determination—Determination for Public Inspection

Occupation 03INS Installers	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 submitted a request for a determination of worker status in regard to services performed for the payer in 2019. The services performed included air conditioning repairs, installs, duct work, wiring, etc. The payer issued the worker Form 1099-MISC for 2019. The worker filed Form SS-8 as he believes he received Form 1099-MISC in error.

The payer's response states its business is the sales, service, and installation of air conditioning and heating systems. The worker was engaged as a heating, venting, and air condition professional. The services performed included the professional installation and repair of [REDACTED] components. The worker was classified as an independent contractor based on the twenty factors documented in [REDACTED]. Both parties understood the worker would be classified as an independent contractor and not an employee. The worker signed a subcontractor agreement.

The payer stated that based on the worker's prior experience, it did not provide the worker specific training or instruction. The worker was never assigned tasks. He could request additional jobs in accordance with his availability. The payer did provide the worker the client's address where services were to be performed, in accordance with the services purchased by the payer's clients. The worker determined the methods by which assignments were performed and he was only responsible for the attainment of the result. The worker's services were not integral to the payer's business operations. The worker simply realized a portion of the profit resulting from providing services to the payer's clients. The worker was responsible for problem or complaint resolution. The payer expected the worker to advise it that the contracted services had been performed and to invoice the payer for the services performed. The worker had no set routine or schedule; he did not have an ongoing relationship with the payer and he was not required to work full-time. He could initiate and perform [REDACTED] services at his convenience and in accordance with his own timetable. Services were performed at the payer's clients' locations, which included the installation of new equipment purchased or the service or repair of existing air conditioning or heating systems. The payer did not require the worker to attend meetings. The payer did not require the worker to personally perform services. The worker could have hired a substitute or helper, for which he would have been responsible to pay. The worker stated the payer provided him on-the-job training. Work assignments, received from the payer, included where to be, what to do, when it was to be completed, and how all tasks were to be completed. If problems or complaints arose, the payer was contacted and assumed responsibility for problem resolution. Reports included time sheets. Services were performed Monday through Friday, on average for 45 to 55 hours each week. Services were performed at residential and commercial customer locations. He was expected to attend the payer's meetings and answer its calls. The payer required him to personally perform services. The payer was responsible for hiring substitutes or helpers.

The payer stated it sells [REDACTED] systems manufactured by independent vendors; it also services and repairs existing [REDACTED] systems. On occasion and in this specific case, the payer allowed the worker use of its sole back-up truck until the worker's vehicle was usable or replaced. The worker was responsible for providing his own tools and supplies. It is unknown if the worker leased, equipment, space, or a facility. The payer did not reimburse the worker for any expenses, including travel, incurred in connection with services performed for the payer. Customers paid the payer. The payer paid the worker an hourly rate of pay; a drawing account for advances was not allowed. The payer did not carry workers' compensation insurance on the worker. The worker's opportunity for profit or loss was based on expenses associated with assistants and tools, machinery, or supplies utilized in connection with the services performed. The worker was also subject to liability for damages. The payer and worker negotiated the level of payment for the services provided. The worker stated the payer provided all, except for tools which he provided. He did not lease equipment, space, or a facility. The payer reimbursed him for minor, incidental supplies needed to complete tasks. He did not incur economic loss or financial risk. He did not establish the level of payment for the services provided.

The payer stated benefits were not made available to the worker. The worker had no responsibility in soliciting new customers. The payer did not have the right to discharge the worker so long as he produced a result that met the contract specifications. The worker could only terminate his relationship with the payer upon completion of all of the services for which he had contracted. The worker performed similar services for others; the payer's approval was not required for him to do so. There was no agreement prohibiting competition between the parties. The worker is not a member of a union. It is unknown if the worker advertised. The payer represented the worker as an independent contractor to its customers. The work relationship ended when the worker terminated his contractual relationship with the payer. The worker stated the work relationship could be terminated by either party without incurring liability or penalty. The payer did not allow him to perform similar services for others. He did not advertise. The payer represented him as an employee to its customers. The work relationship ended when he resigned.

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, the payer's statement that the worker was an independent contractor pursuant to a written 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.

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 [REDACTED] services performed by the worker were integral to the payer's business operation. Clients contacted the payer for the purchase, service, or repair of [REDACTED] systems. It presumably scheduled client appointments, required the worker to report on services performed, and collected payment for services performed. The payer expected the worker to report to job sites neatly groomed and dressed and expected the worker to respect clients at all times. These facts evidence the payer retained the right to direct and control the worker to the extent necessary to ensure satisfactory job performance in a manner acceptable to the payer. Based on the worker's education, past work experience, and work ethic the payer may not have needed to frequently exercise its right to direct and control the worker; however, the facts evidence the payer retained the right to do so if needed.

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 payer 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 payer 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. As acknowledged by the worker, he did not incur economic loss or financial risk. Based on the hourly 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 payer's business. There is no evidence to suggest the worker was engaged for a limited term or that he independently performed similar services 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 payer 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.

Section 530 of the 1978 Revenue Act established a safe haven from an employer's liability for employment taxes arising from an employment relationship. This relief may be available to employers who have misclassified workers if they meet certain criteria. It is important to note that this program does not have the authority to grant section 530 relief in relation to this determination. Section 530 relief is officially considered and possibly granted by an auditor at the commencement of the examination process should IRS select a return(s) for audit. The SS-8 determination process is not related to an examination of returns. There is also no procedure available by which a taxpayer can request an audit for the purpose of addressing eligibility for section 530 relief.

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