

SS-8 Determination—Determination for Public Inspection

Occupation

03MIS Miscellaneous Laborers

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 submitted a request for a determination of worker status in regard to services performed for the firm from March 2019 to November 2019 as a house cleaner. The firm issued the worker Form 1099-MISC and Form W-2 for 2019. The worker filed Form SS-8 as they believe they received Form 1099-MISC in error. The worker requested to be paid as an independent contractor when they were initially classified as an employee of the firm. The worker provided bank statements, an employee handbook, and communication between the firm and the worker as attached documentation to assist with the determination.

The firm's response states it offers professional cleaning services. The work provided by the worker was cleaning. The worker was requested to perform cleaning services at various residential locations for clients of the firm. The firm did not provide supervision or direction. The firm states that they initially classified the worker as an employee and at the worker's request reclassified them to an independent contractor. The firm states that this practice is not a normal practice for the firm.

The firm states that the worker had previous experience in the same field of residential cleaning, therefore there was no training required for the worker. The worker received job assignments through text and email. The worker would text the firm their availability and the firm would send jobs during their availability. The worker could either accept or decline a job. The firm states that the worker determined what tasks were performed at each cleaning. The worker would call the firm's office for problem resolution should they encounter any issues during their job duties. The worker was required to report back to the office what each customer owed after cleanings were performed and report on what hours they performed services. The worker would meet with customers at their location, discuss with them cleaning services they desired, clean, then report back to the office with hours worked and what to charge the customer based upon what was performed. All work was performed at customer locations. The worker was not required to attend any meetings. The worker was required to perform all services personally. If the worker was unable to complete a job, the firm would be responsible for sending someone in their place to finish tasks. The worker was not allowed to hire substitutes. The worker states that they received a job description upon hire stating how to perform job tasks. The worker received jobs through email from the firm. The firm's clients and the firm determined how tasks were done. The worker was in contact through the job's performance and would contact the firm upon job completion. The worker would start their job duties between 9am and 10am throughout the week and weekends. The worker was required to perform services personally and did not have to attend any meetings. The firm would hire and pay any helpers or substitutes needed.

The firm states the worker provided all materials and supplies for the job. The worker did not have to lease any space, facilities, or equipment. The worker's expenses were all cleaning materials and supplies. The firm paid the worker commission and an hourly wage and was guaranteed a minimum amount per hour. The worker was not allowed access to a drawing account for advances. Customers of the firm would pay the firm. The firm carried worker's compensation insurance on the worker. The firm established the level of payment for all services rendered by the worker. The worker states that they supplied all cleaning supplies and their own transportation. The firm did not provide anything. The worker had gas expenses, cleaning supplies expenses, and car maintenance expenses. The worker was paid an hourly wage of 60% of the total job. The worker's attachments show that the worker was paid on a weekly basis. The firm allowed the worker a one-time advance that was paid back slowly through the worker's future paychecks in installments. Customers would pay the firm. The worker encountered some financial risks such as vehicle maintenance issues and other workers stealing money. The firm's owner determined the level of payment for all services rendered.

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 worker did not need approval to perform similar services for other firms. The worker was not a member of a union. The worker did not advertise their services to the public. The worker was represented by the firm as a team member of the firm. The worker left the firm when they moved out of state and the separation was mutually agreed upon by both parties. The worker states that they did not perform similar services for any other firm during the terms of the work relationship. The worker was not a member of a union. There were no non-compete agreements in place between the parties. The worker states that they were represented by the firm as an employee of the firm. The work relationship ended when the worker quit.

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 of residential cleaning. The firm provided work assignments by virtue of the customers served, required the worker to report on services performed upon completion, 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. The worker was also given a guaranteed hourly minimum in the case that they were paid commission. 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 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.