

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 firm is a trucking business. The firm engaged the worker as a shag driver from 09/2019 to 11/2020. This was pursuant to a written agreement between the parties. The worker had previously performed services for the firm. The worker submitted a Form SS-8 after received a Form 1099-Misc from the firm. The firm replied with a Form SS-8.

The firm's perspective is the worker was an independent contractor because he could determine his own schedule.

The worker's perspective is he worker regular hours determined by the firm and the firm provided the worker with all the necessary equipment to perform the services for the firm.

The worker stated he received training from the firm. He was shown how to operate the firm's truck. The firm indicated the worker was shown how to operate the firm's forklift. The worker received verbal instructions regarding the services to be performed. According to the firm, both the worker and the firm determined the methods by which those assignments were performed. The worker describes his work schedule as working 5 days a week, from 8:00am to 5:00pm. He would transport trailers on the firm's premises. Comparatively, the firm stated the worker would arrive at the firm's premises around 8:00am. He would complete maintenance and ground keeping tasks and leave. He received regular remuneration for his services. The firm was responsible for problem resolution. The worker was not required to submit any reports. He performed the services on the firm's premises. The worker was not required to attend any 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.

Both parties agree the worker did not furnish any of the tools or equipment used in performing the services. The worker did not lease equipment. The firm determined the fees to be charged. The worker did not incur any significant business expenses. He was paid an hourly wage. The firm did not allow the worker a drawing account, or advances against anticipated earnings. The firm's customers paid the firm. The firm established the level of payments for the services provided. The firm did not carry worker's compensation insurance on the worker. 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 indicated he was not eligible for sick pay, vacation pay, health insurance, or bonuses. Either party could terminate the work relationship at any time without incurring a penalty or liability. There was not a "non-compete" agreement between the parties. The worker was not a member of a union. According to internal research, the worker did not perform similar services for others. He did not advertise his services to the public or 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 ended when the worker 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.

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.

Therefore, your 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.

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.

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.

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.

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.