

3. Form SS-8 Process

3.1. Background

The purpose of the Form SS-8 is to allow individuals or “firms” to request from the IRS a determination of a worker’s classification as either an employee or an independent contractor under the common-law rules. For this purpose, the term “firm” means any individual, business enterprise, organization, state, or other entity for which a worker has performed services. The firm may or may not have paid the workers directly for these services.

The request must be for a taxable year for which the statute of limitations has not expired. Generally, the statute of limitations expires three years from the due date of the tax return or the date filed, whichever is later. This means that the request must be for a taxable year for which the IRS could make adjustments if it disagreed with how a worker was classified.¹⁵

A firm that receives a Form SS-8 is not required to complete it. The instructions to Form SS-8 state:

If any worker or the firm has requested a status determination and you are being asked to provide information for use in that determination, you are not required to provide the requested information. However, failure to provide such information will prevent the IRS from considering it in making the status determination.

The benefit to a firm in completing Form SS-8 is that it provides the IRS with the firm’s position on the worker’s classification. If the firm does not complete the Form SS-8, the IRS will be making its determination based on its information and the information provided by the worker.

The Form SS-8 notes that the information provided on it may be disclosed to the firm, worker, or payer named in it to assist the IRS in the determination process. The Form contains the following statement in bold type: **If you do not want this information disclosed to other parties, do not file Form SS-8.**

In most cases in which a worker files a Form SS-8, the worker is doing so because he or she is contending that he or she was an employee, not an independent contractor. This may be prompted by the worker’s failure to make estimated tax payments to cover his or her income tax and self-employment tax liability. The worker may be trying to avoid a significant liability for taxes, penalties, and interest; thereby increasing the motivation to classify himself or herself as an employee. The worker’s recollection of the facts and interpretation of the arrangement may be very different from the firm’s recollection and interpretation.

The detriment to the firm in completing the Form SS-8 is the time it takes to respond. Moreover, if the person completing the Form SS-8 is not sensitive to the import of the questions being asked, the answers may be more harmful than if the Form were not completed. If the likelihood were high that the IRS would open an employment tax examination of the firm as a

result of the worker’s request for a determination, it would be prudent for the firm to take the time to carefully respond to the questions. According to a 2009 GAO Report (discussed later), however, very few Form SS-8 determinations have resulted in an examination of the firm. If this low examination rate were to continue, many firms may be willing to accept the risk that their failure to respond will result in the worker being classified as an employee.

Another factor that each firm must consider is the potential tax consequence to having all workers performing similar services reclassified as employees. The higher the potential tax consequences, the less risk a firm may be willing to take.

A key factor in this analysis is the significantly increased employment tax examination activity of the IRS. As noted above, in early 2010, the IRS launched its National Research Employment Tax Program. One of its objectives was to take a hard look at worker classification issues. It is expected that the IRS will use the information it obtains to better target taxpayers for worker classification examinations and further develop its worker classification examination guidelines.

In addition to the National Research Employment Tax Program, there have been a number of legislative proposals recently to address the worker classification issue. These developments argue in favor of responding to a Form SS-8 inquiry, and possibly doing some internal analysis of worker classification even if a Form SS-8 is not received.

3.2. Process

The instructions to the Form SS-8 describe the following process. Once a Form SS-8 is filed, the IRS will acknowledge its receipt. Because there are usually two (or more) parties who could be affected by a determination of employment status (e.g., the worker and the firm), the IRS attempts to get information from all parties involved by sending those parties blank Forms SS-8 for completion. Some or all of the information provided on this Form SS-8 may be shared with the other affected parties.

The case will be assigned to an IRS technician who will review the facts, apply the law, and render a decision. The technician may ask for additional information from the requestor, from other involved parties, or from third parties that could help clarify the work relationship before rendering a decision. The IRS generally will issue a formal determination to the firm or payer (if that is a different entity), and will send a copy to the worker. A determination letter applies only to a worker (or a class of workers) requesting it, and the decision is binding on the IRS if there is no change in the facts or law that form the basis for the ruling. In certain cases, a formal determination will not be issued. Instead, an information letter may be issued. Although an information letter is advisory only and is not binding on the IRS, it may be used to assist the worker to fulfill his or her federal tax obligations.

A firm that receives a formal determination or an information letter is not required to classify its workers as provided in

¹⁵ Employers report employment taxes quarterly on IRS Form 941. Generally, the statute of limitations for Forms 941 filed in a calendar year expires three years from April 15 of the succeeding calendar year or the date the return was filed, whichever is later.

the formal determination or information letter.¹⁶ This is because neither the Form SS-8 determination process nor the review of any records in connection with the determination constitutes an examination (audit) of any federal tax return. If the periods under consideration have previously been examined, the Form SS-8 determination process will not constitute a reexamination under IRS reopening procedures. Because this is not an examination of any federal tax return, the appeal rights available in connection with an examination do not apply to a Form SS-8 determination. However, if the individual or firm disagrees with a determination and the party has additional information concerning the work relationship that the party believes was not previously considered, the party may request that the determining office reconsider the determination.

The IRS Internal Revenue Manual¹⁷ states that Form SS-8 is a potential source of leads for employment tax examinations.

¹⁶ When the IRS determines that a firm has misclassified an employee (or class of employees) as independent contractors, it will provide guidance on how to voluntarily amend its tax returns to comply with the determination.

¹⁷ The IRM is the primary, official source of “instructions to staff” that relate to the administration and operation of the IRS. It details the policies, delegations of authorities, procedures, instructions, and guidelines for daily operations for all IRS organizations. The IRM ensures that employees have the approved policy and guidance they need to carry out their responsibilities in administering the tax laws or other agency obligations. “IRM Standards,” Internal Revenue Manual, IRM 1.11.2.2, Internal Revenue Service, U.S. Dep’t of the Treasury (May 8, 2014) (quotation marks in original).

The IRM instructs IRS agents that, after completing all actions related to issuance or non-issuance of the determination letter, the Form SS-8 centralized location should determine whether there is any examination potential in the forms received. After the IRS makes its determination, it uses specific criteria to determine which cases it should refer for examination, including the amount of compensation the worker in question earned, the number of similar workers hired by the employer, and whether the case likely involves fraud.

According to a 2009 GAO Report,¹⁸ 72% of all Form SS-8 requests filed in fiscal year 2008 resulted in IRS determinations that the workers in question were employees, 25% were closed without any advice given, and three percent resulted in determinations that the workers in question were independent contractors or had other results.

The majority of employers the IRS has determined have misclassified employees are very small businesses, which generally are not referred because examining such businesses is generally not cost effective. As a result, IRS officials estimated that for recent tax years, only an average of 2% to 3% of firms it identifies to have misclassified employees through the Form SS-8 determinations were referred for examination, and an even smaller percentage resulted in examination.

¹⁸ U.S. Gov’t Accountability Office, GAO-09-717, Employee Misclassification: Improved Coordination, Outreach, and Targeting Could Better Ensure Detection and Prevention (Aug. 2009) at 21.