

**SS-8 Determination—Determination for Public Inspection**

Occupation 01FRW Farm/Ranch Workers	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 from April 2017 to November 2018. The services performed included cleaning stalls and feeding horses. The payer issued the worker Form 1099-MISC for 2017 and 2018. The worker believes she was an employee as the payer provided the tools used and set her work schedule. There was no written agreement between the parties.

The payer's response states it is a small boarding facility for 9 – 10 horses. The worker was engaged as a stall cleaner/horse care worker. The services performed included mucking stalls, bringing horses in, stuffing hay bags, feeding grain, and filling water buckets. The worker was classified as an independent contractor as she chose the tasks performed, scheduled work around other commitments, worked at other barns, and substituted others to do or assist with the work. Hiring contract workers to perform these activities is a longstanding and widely recognized industry practice. Services were performed under a verbal arrangement agreed to by both the payer and the worker.

The payer stated it provided the worker 1 - 2 hours of orientation/guidelines. The payer did not dictate the order in which the work was completed, other than that horses should generally be in before dark. The payer did not ask the worker for any other work outside of the activities the worker had agreed to. The worker chose from available tasks per day, i.e. work assignments. The worker determined the methods by which assignments were performed. The worker interacted with the horse owner to resolve complaints. Reports and meetings were not required. The worker's schedule varied based on other commitments, i.e. school, vacations, and social events. Services were performed at the payer's premises. The payer did not require the worker to personally perform services. The worker could hire substitutes or helpers without the payer's approval. The worker was responsible for paying substitutes or helpers. She was not reimbursed by the payer. The worker stated the payer provided her specific training explaining how work was to be performed. The payer provided work assignments, determined the methods by which assignments were performed, and assumed responsibility for problem resolution. Services were performed on a regularly scheduled basis, i.e. Monday and Wednesday, 3:30 – 6:30; Friday, Saturday, and Sunday, 10 – 1. The payer required she attend one staff meeting. The payer was responsible for hiring and paying substitutes or helpers.

The payer stated it provided a muck rake and bucket. The worker provided and incurred the unreimbursed expense associated with boots and providing an optional muck rake. The worker did not lease equipment, space, or a facility. Customers paid the payer. Customers also paid the worker directly for individualized services. The payer paid the worker piece work, i.e. a flat rate for each activity. A drawing account for advances was not allowed. The payer did not carry workers' compensation insurance on the worker. The worker's economic loss or financial risk related to a broken rack and worn boots, in addition to whether services were personally performed, or substitutes or helpers were engaged to perform services. The worker established the level of payment for the services provided. The worker stated the payer provided a pitchfork, wheelbarrow, and Toro. She did not incur expenses in the performance of services for the payer. Incurring economic loss or financial risk was not applicable. She did not establish the level of payment for the services provided.

The payer stated benefits were not provided to the worker. The work relationship could be terminated by either party without incurring liability or penalty. The worker performed similar services for others; the payer's approval was not required for her to do so. There were no constraints prohibiting competition between the parties. The worker advertised via word-of-mouth. The payer represented the worker as a contractor to its customers. The work relationship ended when the worker quit. The worker stated she did not perform similar services for others or advertise. The payer did not represent her to its customers.

Both parties agreed the worker was not responsible for soliciting new customers.

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## 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 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.

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 services performed by the worker were integral to the payer's business operation. The payer provided specific guidelines and work assignments by virtue of the customers served, in addition to collecting customer payment for boarding services. 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 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.

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 payer's customer for poor work, the payer shares the risk of such loss. Control of the payer over the worker would be necessary in order to reduce the risk of financial loss to the payer. The opportunity for higher earnings or of gain or loss from a commission arrangement is not considered profit or loss. 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. Based on the flat 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. 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 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.

The payer can obtain additional information related to worker classification online at [www.irs.gov](http://www.irs.gov); Publication 4341.