

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

Occupation

01FRW Farm/Ranch Workers

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 payer from July 2016 to November 2016. The services performed included starting up and shutting down the milk system, milking and feeding cows, scraping the barn, cleaning pens, and hauling manure. The payer issued the worker Form 1099-MISC for 2016. The worker filed Form SS-8 as she believes she received Form 1099-MISC in error.

The payer states it is a dairy and crop farming business. The worker was engaged to milk cows and do chores as needed. The worker, a custom-hire due to other engagements and combining this work with other farming activity, requested to be classified as an independent contractor. There was no written agreement between the parties.

The payer stated work assignments consisted of weekly requests to complete tasks based on the worker's hourly rate. The worker determined the methods by which assignments were performed. The payer was contacted if problems or complaints arose. The payer was responsible for resolution. Reports included verbal communication of work completed and independent verification by the payer. The worker's daily routine consisted of milking cows, morning and evening, in addition to associated chores as needed. Services were performed at the dairy farm, 80% of the worker's time, and fields, 20% of the worker's time. Meetings were not required. The payer required the worker to personally perform services. The worker was responsible for hiring and paying substitutes or helpers. The worker stated the payer provided her daily instructions on what to do. Work assignments were verbally received. The payer determined the methods by which assignments were performed. Services were performed at the payer's premises. The payer was responsible for hiring and paying substitutes or helpers.

The payer stated it provided milking equipment and supplies. The worker provided and incurred the expense associated with industry specific clothing, safety gear, travel, and any supplies provided by the worker. The worker did not lease equipment, space, or a facility. Customers paid the payer. The payer paid the worker a weekly rate of pay; a drawing account for advances was not allowed. The payer did not carry workers' compensation insurance on the worker. The worker did not establish the level of payment for the services provided. The worker stated she provided boots. She did not incur expenses in the performance of services for the payer. The payer paid her salary.

The payer stated 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. The worker advertised as custom-hire. The payer represented the worker as custom-hired help 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 fired her.

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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.

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 payer required the worker to personally perform services. Furthermore, the services performed by the worker were integral to the payer's dairy operation. The payer provided work assignments, required the worker to verbally report on work completed, and assumed responsibility for problem resolution. 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. Based on the hourly or weekly 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.