

# SS-8 Determination—Determination for Public Inspection

Occupation

02CSP Computer Services Personnel

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 February 2017 to June 2019, as an HVAC designer. The services performed by the worker included the designing of HVAC systems. The firm issued the worker Form 1099-MISC for tax years in question. The worker filed Form SS-8 as they believe that they erroneously received Forms 1099-MISC.

The firm's response states that the business specializes in HVAC design. The firm agrees that the worker performed services as an HVAC designer. The firm classified the worker as an independent contractor due to a written agreement signed between the two parties.

The firm provided specific training and/or instruction to the worker. The firm provided work assignments to the worker. The worker determined the methods by which assignments were performed. The firm was ultimately responsible for complaint or problem resolution. Reports and meetings were not required. The worker was required to personally perform services. The firm was responsible for the paying of substitutes and helpers.

The firm provided licenses, subscriptions, and training material. The worker provided a laptop. The worker did not lease any equipment, space, or a facility from the firm. The worker incurred no expenses. The worker was paid a percentage on a per project basis; a drawing account for advances was not allowed. The firm did not cover the worker under its workers' compensation insurance policy. The firm established the level of payment for the services provided. All customers paid the firm. The worker did not experience an economic loss or carry a financial risk.

The worker received no benefits. The work relationship could be terminated by either party without incurring a liability or penalty. The worker did not perform similar services for others during this work relationship. The worker was not a member of a union. The work relationship ended.

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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 they have 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, co-adventurer, agent, or independent contractor must be disregarded. 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. The firm provided assignments by virtue of its customers and assumed responsibility for problem resolution. These facts are evidence that 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, 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 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.