

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

Occupation

02OFF Office 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 performed services for the firm from September 2018 until February 2019 as an executive administrative assistant. The worker was requested to assist in meetings and perform clerical duties. The worker feels they were misclassified by the firm because the worker performed services assigned by the firm on the firm's schedule.

The firm states that it is an aluminum foundry. The worker's job title was executive assistant, and the worker was requested to provide administrative support to the firm. The firm believes that the worker was an independent contractor because the worker was on a trial period. There were no written agreements between the parties.

The firm states that the worker was not given any specific training. The firm's accounting manager instructed the worker to perform basic bookkeeping duties and routines. The firm states that the firm's management was responsible for problem resolution and determining how job assignments were performed. The worker was expected to greet visitors, perform clerical duties, take meeting minutes, assist the owners and safety department, on a set schedule from 8am until 5pm. The worker performed services 80% of the time at the firm's office and production area and 20% of the time assisting with the safety patrol. The firm states that the worker was not required to attend any meetings or personally perform services. The firm's management was responsible for hiring helpers and the firm was responsible for paying them. The worker states that they were instructed to abide by the firm's rules and regulations. The firm would schedule all work assignments for the worker. The firm determined the methods by which job assignments were performed. If the worker encountered any problems or complaints, they were required to contact the firm for problem resolution. There were no reports required of the worker. The worker performed services on a set schedule from 8am until 5pm on Monday through Friday with a scheduled half-hour lunch break. All services were performed at the firm's premises. The worker was required to attend mandatory staff meetings. The worker was required to perform services personally. Helpers and substitutes were not applicable to the work situation.

The firm states that they provided all supplies to the worker and the worker did not have to provide anything or lease anything for their job duties. The worker incurred no expenses. The worker was paid an hourly wage and twice was allowed access to a drawing account for advances. Customers paid the firm for services provided, and the firm states that they carried worker's compensation insurance on the worker. The firm states that the worker did not have any exposure to economic loss or financial risk. The firm states that the firm's financial department set the level of payment for services provided. The worker states that the firm provided all supplies, materials, and equipment for the worker's job duties. The worker was paid an hourly wage by the firm with no access to a drawing account for advances. The worker provided a copy of a letter from the firm to the worker stating their hourly wage and set hours. The worker also provided copies of payroll sheets to show their hours worked. Customers paid the firm for services provided. The firm carried worker's compensation insurance on the worker. The worker faced no economic loss or financial risk during their job duties. The firm established the level of payment for services provided.

The firm states that they provided the worker with holiday pay. The relationship between the parties could be terminated by either party without liability or penalty. The firm states that the worker did not perform similar services for other firms during the work relationship. The firm states that there were no non-compete agreements in place between the parties. The firm states that the worker was not a member of a union and did not advertise their services to the public. The firm states that the worker was represented as an executive assistant by the firm. The firm states that the work relationship ended when the firm faced financial difficulty and the worker was let go. The worker states that the firm did not provide any benefits to the worker. The worker signed a non-disclosure agreement with the firm. The worker was not a member of a union and did not advertise their services to the public. The worker was represented by the firm as an employee of the firm performing services under the firm's name. The worker provided a copy of an employment verification letter that the firm provided for them stating that they were an employee of the firm. The work relationship ended when the firm could not afford to pay their workers, so they let their workers go.

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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, co-adventurer, agent, or independent contractor must be disregarded.

Therefore, a statement that a worker is an independent contractor pursuant to a written or 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 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 work assignments by virtue of the customers served and assumed responsibility for problem resolution. These facts evidence 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, day, 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. 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 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 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. 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 firm 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 firm can obtain additional information related to worker classification online at [www.irs.gov](http://www.irs.gov); Publication 4341.