

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

Occupation

Business/Computer Services/Office/Sales

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 is seeking a determination of worker classification for services performed for the firm as an administrative assistant from February 2019 until June 2019. The worker received a 1099-MISC from the firm for 2019. The worker feels that they were misclassified as an independent contractor because the firm's owner directed and controlled the worker's job duties and performance. There were no written agreements between the parties. The worker provided a copy of their monthly schedule of availability and their letter of resignation.

The firm states that it provides window coverings for homes and businesses. The worker was requested to perform administrative duties and help get new business leads as a marketing coordinator. The firm feels that the worker was an independent contractor because the worker performed services when they wanted to do so and provided their availability to the firm on a monthly basis.

The firm states that they trained the worker on their basic job duties. The worker received job assignments in person, through email, and texts. The firm's president and manager determined how job assignments were completed. If the worker encountered problems or complaints, they were required to contact the firm's owner for problem resolution. There were no reports required of the worker. The firm states that the worker worked whenever they wanted to do so. The worker divided up her work duties between their home office and the firm's office. The firm met with the worker only when they needed the worker's assistance. The firm required the worker to personally perform services. The firm's owner was responsible for hiring and paying all helpers and assistants needed. The worker states that the worker provided detailed instruction regarding their job duties. The worker was trained extensively for 2 months by the firm. The worker was required to text the firm every evening to determine where and when they would be working the next day. The worker was also required to have a landline installed in their home for company faxes, to check that fax every day, and to use company templates for emails. The worker was evaluated on their job performance by the firm and all processes and output of work was closely supervised by the firm. The worker received job assignments through fax, email, text, and verbally. The firm determined how jobs were performed and assumed responsibility for problem resolution. The worker created reports on field sites, builder reports, and personal budgets. The worker didn't have a set schedule as it varied from day to day, anywhere from 8 to 12 hours shifts and 6 days a week. The worker performed 60% of their job duties at the firm's office, 20% in the field, and 20% in their home office. The worker was required to attend monthly marketing meetings and weekly one-on-one meetings with the firm. Helpers and substitutes were not applicable.

The firm states that they provided the worker with a copier and marketing materials. The worker did not lease any space, facilities, or equipment, and the worker's only expense was gas. The firm paid the worker salary, commission, and on a piecework basis. There was no access to a drawing account for advances. Customers paid the firm for services provided. The firm did not carry worker's compensation insurance on the worker. The worker faced no economic loss or financial risk. The firm states that they set the level of payment for services provided. The worker states that the firm provided a fax, copier machine, pens, pencils, paper, post-it notes, and business cards. The firm gave the worker a company credit card to use for office supplies. The worker provided a laptop and a phone. The worker incurred the cost of installing a fax line for the company fax, gas, mileage, and cost of headshots. The worker was paid a salary base with commission and was guaranteed a minimum monthly payment. Customers paid the firm, and the worker did not face any economic loss. The worker states that the firm established the level of payment for services provided.

The firm states that they provided the worker with bonuses as a job benefit. The relationship between the parties could be terminated by either party without liability or penalty. There were no non-compete agreements between the parties. The worker advertised solely on behalf of the firm with provided marketing materials. The worker was represented by the firm as a contractor performing services under the firm's name. The worker resigned and ended the work relationship. The worker states that after one year, the benefits offered the firm included paid vacations and holidays. The worker did not perform similar services for other firms during the work relationship. The worker was not a member of a union and advertised on behalf of the firm on social media and door-to-door. The worker was represented by the firm as an employee performing services under the firm's name.

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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, 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, required the worker to report on services performed through a variety of reports, 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 salary 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.