

**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 is seeking a determination of worker classification for clerical services performed for the firm from December 2017 until November 2019. The worker received a 1099-MISC from the firm for 2017, 2018, and 2019. The worker feels that they were misclassified as an independent contractor because they worked for a small business owner, were not to exceed a certain number of hours weekly, were paid hourly, and their lunch breaks were subtracted from their pay. There were no written agreements between the parties.

The firm states that it offers real estate services. The worker was required to provide services as a rental assistant and also perform cleaning services. The worker was classified as an independent contractor because they received commissions, performed cleaning services on a per-job basis, and used their own supplies, car and phone.

The firm states that the worker received instruction from the firm through access to a computer, advertising, and the office phone. The worker would determine their schedule regarding cleaning and showings for the firm and determined the methods by which they would perform job assignments. If the worker encountered any problems or complaints while working, they were required to contact the firm's owner for problem resolution. The worker was required to provide the firm with reports on all job tasks performed, pictures, and credit checks run. The worker would determine their schedule and would provide the firm with a schedule of their hours worked. The worker would pick up work assignments at the office, then perform showings and cleanings in different locations. The firm did not require the worker to attend any meetings, and the firm required the worker to perform services personally. Substitutes and helpers were not applicable to the work situation. The worker states that they were instructed by the firm to perform various clerical duties and property showings. The worker received job assignments via web, verbally, or by phone. The firm's owner determined the methods by which jobs were performed. If the worker encountered problems on the job, they were required to contact the firm's owner for problem resolution. The worker provided the firm with time sheets. The worker performed services from 10 am until 5 pm or 8 am until 4 pm at the firm's office premises. There were no meetings required of the worker. The firm's owner was responsible for hiring and paying all helpers needed.

The firm states that they provided the worker with advertising, leads, and a computer. The worker provided their phone, their car, and supplies, which were their incurred expenses. The worker did not lease any space, facilities, or equipment. The firm sometimes provided the worker with a draw for supplies. The firm paid the worker on a commission and piece work basis. Customers paid the firm, and the firm did not carry worker's compensation insurance on the worker. The worker established 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, and the worker provided nothing. The worker incurred gas and mileage expenses. The worker states that they were paid an hourly wage and commission by the firm, and the firm had a guaranteed minimum provided to the worker. The worker faced no economic loss or financial risk. The firm owner established the level of payment for services provided.

The firm states that they did not provide the worker with any benefits. The relationship between the parties could be terminated by either party without liability or penalty. The worker performed similar services for other firms and did not need approval from the firm to do so. There were no non-compete agreements in place between the parties. The worker was not a member of a union. The firm represented the worker as a contractor. The work relationship ended when the contract ended, and the job was completed. The worker was required to complete credit and background checks on prospective tenants for the firm, and all documents were submitted to the firm's owner. The worker states that they did not perform similar services for other firms. 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 performing services under the firm's name. The worker quit and ended the work relationship.

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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, 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.