

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

Occupation

03FMW Factory/Mill 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 initiated the request for a determination of his work status as an assembly/production worker in tax year 2017, for which he received Form 1099-MISC. The firm's business is described as manufacturing of LED lighting.

The firm's response was signed by the firm's Chief Technology Officer (CTO). The firm's business is the assembly of electronic technology and the worker provided services assembling electronic technology, both prototype and customer orders. The worker was hired as short-term help.

The worker responded that he was given on-the-job training and instructions. The job assignments and the methods by which he performed the tasks were determined by the firm. Any problems or complaints encountered by the worker were directed to the firm for resolution. The worker indicated his services were rendered on the firm's premises from 7 am to 3 pm, Monday through Friday and he was required to use a time clock. The worker was not required to perform the services personally.

The firm stated the worker's training and instructions consisted of walking him through the necessary steps for each project. The job assignments were given when the workers showed up for work; and, it was the firm that determined the methods by which the worker's services were performed. The worker directed any problems or complaints that could arise to the firm for handling. The firm responded there was no set schedule; the worker could come in when he chose and was not required to complete a project before he left. The worker was allowed to do work at home or at the firm's location; there was no restricted time for the worker at either location. An attempt to clarify the work performed at the alternate location was not successful; the firm stating the SS-8 response was sufficient. The firm indicated the worker was required to perform the services personally; any additional personnel were hired and paid by the firm.

The firm and worker acknowledged the firm provided and made available to the worker the materials, tools, and building. The firm indicated the worker could bring personal tools; the worker responded that he furnished nothing. The worker did not lease equipment, space, or a facility. The firm responded that the worker was paid based on type of work/job he chose. A telephone contact was initiated to the firm to clarify this statement; however, the firm was not willing to expound on this. The worker stated he was paid an hourly wage. Both parties concur that the customers paid the firm, the worker was not covered under the firm's workers' compensation insurance policy, the worker was not at risk for a financial loss in this work relationship, and the worker did not establish level of payment for services provided or products sold.

There were no benefits offered to the worker. Either party could terminate the work relationship without incurring a liability or penalty. The firm and worker agreed the worker was not performing same or similar services for others during the same time frame; although the firm added the worker was not prohibited from working for others. The worker stated he left the job to return to school.

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## Analysis

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A worker who is required to comply with another person's instructions about when, where, and how he or she is to work is ordinarily an employee. This control factor is present if the person or persons for whom the services are performed have the right to require compliance with instructions. Some employees may work without receiving instructions because they are highly proficient and conscientious workers or because the duties are so simple or familiar to them. Furthermore, the instructions, that show how to reach the desired results, may have been oral and given only once at the beginning of the relationship.

Training a worker by requiring an experienced employee to work with the worker, by corresponding with the worker, by requiring the worker to attend meetings, or by using other methods, indicates that the person or persons for whom the services are performed want the services performed in a particular method or manner. This is true even if the training was only given once at the beginning of the work relationship.

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 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.

The fact that the person or persons for whom the services are performed furnish significant tools, materials, and other equipment tends to show the existence of an employer-employee relationship.

A person who can realize a profit or suffer a loss as a result of his or her services is generally an independent contractor, while the person who cannot is an employee. "Profit or loss" implies the use of capital by a person in an independent business of his or her own. The risk that a worker will not receive payment for his or her services, however, is common to both independent contractors and employees and, thus, does not constitute a sufficient economic risk to support treatment as an independent contractor. If a worker loses payment from the firm's customer for poor work, the firm shares the risk of such loss. Control of the firm over the worker would be necessary in order to reduce the risk of financial loss to the firm. The opportunity for higher earnings or of gain or loss from a commission arrangement is not considered profit or loss.

We have considered the information provided by both parties to this work relationship. In this case, the firm retained the right to change the worker's methods and to direct the worker to the extent necessary to protect its financial investment and business reputation and to ensure its customers' satisfaction and that its contractual obligations were met. The worker was not operating a separate and distinct business; the worker did not invest capital or assume business risks, and therefore, did not have the opportunity to realize a profit or incur a loss as a result of the services provided. Integration of the worker's services into the business operations generally shows that the worker is subject to direction and control. When the success or continuation of a business depends to an appreciable degree upon the performance of certain services, the workers who perform those services must necessarily be subject to a certain amount of control by the owner of the business. 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.

## CONCLUSION

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.