

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

Occupation

03FMW Factory or 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 a laborer operating a machine; he put sand through a sieve, bagged it, and completed reports in tax year 2018. He was issued Form 1099-MISC. The firm's business is described as a manufacturer of filtration screens for the oil and water well industries.

The firm's response was signed by the CFO. The firm's business is manufacturer of down hole well screens for sand control purposes. The worker provided services separating sand from other particles, drying the sand, and then running through various sieves to determine the size of the sand.

The worker indicated he was given training and instructions on how to do the job and how to fill out the forms/sieve analysis reports. The job assignments came from the firm's supervisor. The firm determined the methods by which the worker's services were performed; and, any problems or complaints encountered by the worker were directed to the firm for resolution. The worker's services were rendered on the firm's premises from 5:30/6am to 2:30/3pm, or until he was told to go home because the other person doing the same job came in. The worker was required to perform the services personally; any additional personnel were hired and paid by the firm.

The firm responded that there was a 30-minute discussion as to the methodology for the testing, an overview of the equipment, and the test results needed. The job assignments were a result of a contact from a customer and an email to the worker inviting him to do the work. The service provider/worker determined the methods by which the services were performed. The worker would contact a production manager in the rare instance there was an issue. The firm stated the worker's services were project-based and sporadic and were performed on the firm's premises because the sand samples were sent there and the analysis had to be done on site. The worker was required to perform the services personally; the hiring and paying of any substitute or helper was considered N/A.

The firm and worker acknowledged the firm provided burner, scale, sieves and any other materials or supplies. The worker furnished nothing other than his transportation. The worker did not lease equipment, space, or a facility. Both parties agree the worker was paid an hourly wage. The worker provided copy of his time card with his name, employee number, with the date, and in/out times. The worker noted that when the firm was informed he could not work nights his hourly rate was reduced by \$1.00 per hour. He also stated that with each pay check he was also given a typed 'invoice'. The firm provided a similar invoice. 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 unless he was injured on the job. The firm and worker agree the worker did not establish level of payment for services provided or products sold; but, agreed to an hourly wage of \$YY.

The firm and worker concur there were no benefits extended to the worker and that either party could terminate the work relationship without incurring a liability or penalty. The worker was not performing same or similar services for others during the same time frame. The firm and worker agree the worker completed a Sieve Analysis Report and turned it into the firm. The worker indicated he quit because every time the other employee came in he was told to go home.

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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.

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.

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.

Lack of significant investment by a person in facilities or equipment used in performing services for another indicates dependence on the employer and, accordingly, the existence of an employer-employee relationship. 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. Also, if the firm has the right to control the equipment, it is unlikely the worker had an investment in facilities.

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.