

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

Occupation

03INS Installers

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 firm is in the business of providing temporary structure fabrication and installation as well as providing the rental of other related equipment for events. The worker was engaged to provide temporary structure installation on a seasonal basis. The worker received a 2016 Form 1099-MISC for his services in 2016; however, both parties indicated that the worker had performed similar services for the firm throughout a number of years, and continued to work for the firm in 2017. There were no written agreements other than offers of employment.

According to the worker, the firm gave the worker instructions on how and where to assemble tents as well as safety training; however, the firm noted he needed no training as he was experienced. The firm noted that the worker was called by phone when needed but that the assignments were optional. The worker noted that he was given a delivery sheet with materials listed and the truck to be used. There was disagreement over which party determined the methods by which the assignments were performed; however the tents themselves usually could only be set up one way. The firm's manager would be contacted if any issues or problems arose. The worker was not required to submit any written reports. The firm noted that the worker set his own schedule; however the worker noted that his routine was to arrive in the morning, load, unload, and reload trucks, deliver and install rental materials. All his services were performed at the firm's location and at their customer event sites. There was disagreement on whether there were meetings to attend. The worker noted that he was required to provide the services personally. The firm disagreed; however, they indicated that they approved all hired substitute workers and paid them.

Both the firm and the worker agreed that the firm provided major tools and equipment such as tents, tables, furniture, tools, ropes, safety equipment, and ladders. The firm noted that the worker also provided tools and equipment. The worker was paid an hourly rate and both agreed that he had no other economic risk. The firm did not provide any information on the worker's compensation nor provide any invoices or bids on any job from the worker. The firm indicated that either party could be paid by the customer and that which party established the level of payment for services depended on undefined elements.

Both the firm and the worker agreed that there were no benefits and that either party could terminate the relationship without incurring a liability. The worker did not perform similar services for others as that was not allowed. The firm noted that they did not know if he worked for others. The worker indicated that he was required to wear the firm's (logo) hat and shirt each morning. The worker provided an offer letter from the firm; it offered the worker a new compensation package with his position continuing as a Field Supervisor, Operations. The worker also presented a request for verification of employment, filled out by the firm's office manager and dated in 2016; this form acknowledged that the worker started working in 2012 for the firm. The relationship ended when the worker quit.

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## Analysis

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In determining whether an individual is an employee or an independent contractor under the common law, all evidence of both control and lack of control or independence must be considered. The relationship of the worker and the business must be examined. Facts that show a right to direct or control how the worker performs the specific tasks for which he or she is hired, who controls the financial aspects of the worker's activities, and how the parties perceive their relationship should be considered. The determination of the worker's status, then, rests on the weight given to the factors, keeping in mind that no one factor rules. The degree of importance of each factor varies depending on the occupation and the circumstances.

Factors that illustrate whether there is a right to control how a worker performs a task include training and instructions. 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. From the information provided, the worker had performed his services throughout a number of years for the firm and therefore, was experienced in this line of work. This also indicated that he likely would not have required extensive instructions. However, he would still need instructions regarding the event such as items needed, location, day and time. The firm obtained the customers who contacted the firm to make any required arrangements for their services. While the worker may have worked only seasonally during the time period in question, 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. In this case, the work relationship with the worker had been ongoing. The worker worked when needed and once accepting the job, it is reasonable to assume that the worker was told when the event was scheduled. This requirement that the worker be on the job at a certain time is also an element of control. The worker's services for the firm were all performed where designated by the firm to meet its customers' requirements. Again, a factor that suggests the firm's ability to retain control over the worker. While the worker's services may have been on a 'seasonal' basis, his services were continuous and not just a one-time occurrence. A continuing relationship between the worker and the person or persons for whom the services are performed indicates that an employer-employee relationship exists. A continuing relationship may exist where work is performed in frequently recurring although irregular intervals.

Factors that illustrate whether there is a right to direct and control the financial aspects of the worker's activities include significant investment, unreimbursed expenses, the methods of payment, and the opportunity for profit or loss. In this case, 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. The worker had no significant investment in the rental equipment or other items needed to provide his services. 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. The worker received an hourly rate of pay and had no other economic risk other than the loss of this compensation. 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.

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. There were no benefits and there was no written agreement. The worker was engaged to provide labor for the firm's tent and equipment rental operations. When doing so, the worker was not engaged in a separate business venture. 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.

It is acknowledged, from information provided by the firm, that the worker may have been promoting his services. Usually, the fact that a worker makes his or her services available to the general public on a regular and consistent basis generally indicates an independent contractor relationship; however, also from information provided, the worker had worked continuously for the firm over a number of years.

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. This right to exercise direction and control existed whether or not that right was fully exercised.

Please see Publication 4341 for guidance and instructions for firm compliance.