

# SS-8 Determination—Determination for Public Inspection

Occupation 03INS Installers	Determination: <input checked="" type="checkbox"/> Employee <input type="checkbox"/> Contractor
UILC	Third Party Communication: <input checked="" type="checkbox"/> None <input type="checkbox"/> 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 submitted a request for a determination of worker status in regard to services performed for the firm from January 2016 to December 2018. The work performed by the worker included assisting with the drilling and installation of water well, pump, water lines and any needed job site prep-work or clean-up. The worker never operated the drilling equipment personally as he is not licensed to do so. The firm issued the worker Form 1099-MISC for the years in question. The worker filed Form SS-8 as he believes he erroneously received Form 1099-MISC.

The firm's response states its business is the installation of water well and pump at new construction and existing residential and business locations; service work to water well and pumps; water testing; well abandonment; well inspections; well/pump compliance upgrades. The worker was engaged as a handyman/maintenance laborer. The work performed included assembling test pump and permanent pump, unwrapping and wrapping welding cables and cutting torch hoses, and checking truck engine oil. The worker was classified as an independent contractor as he stated he wanted to operate on his own schedule and work for other businesses based on his own ventures. The parties had a verbal agreement which allowed the worker to set his own schedule and work for others. The firm agreed to pay the worker hourly rates of pay for non-service related jobs and for service calls. The worker would be paid when the customer paid the firm. There was no obligation for the firm to offer work to the worker or for the worker to accept work offers.

The firm stated it did not provide the worker specific training or instruction. The firm would contact the worker when it had a job. The worker would inform the firm if he was available. The worker determined the methods by which assignments were performed. Customers contacted the firm if problems or complaints arose. To keep its reputation, the firm returned to fix the issue. Reports and meetings were not required. The worker's routine was based on his availability. Services were performed at customer locations. The firm did not require the worker to personally perform services. Hiring substitutes or helpers was not applicable and never came up. The worker stated the firm provided verbal instruction at the job site. The firm determined the methods by which assignments were performed and assumed responsibility for problem resolution. His routine consisted of meeting at the firm's address, traveling to the job site with the firm, and performing tasks assigned. On occasion, the firm sent him to a job site for finish work. 5% of his time was spent at the firm's business for loading and unloading equipment, in addition to performing maintenance work. 95% of his time was spent at customer locations. The firm required he personally perform services. The firm was responsible for hiring and paying substitutes or helpers.

The firm stated it provided pumps to be assembled and lead lines attached to work trucks. The worker provided work gloves. The worker did not lease equipment, space, or a facility. The worker incurring expenses in the performance of services for the firm was not applicable. Customers paid the firm. The firm paid the worker an hourly rate of pay when the customer paid the final billing. A drawing account for advances was not allowed. The firm did not carry workers' compensation insurance on the worker. The worker incurring economic loss or financial risk was not applicable. The firm established the level of payment for the services provided or the products sold. The worker stated the firm provided all including the required license and equipment.

The firm stated the work relationship could be terminated by either party without incurring liability or penalty. The worker performed similar services for others; the firm's approval was not required for him to do so. There was no agreement prohibiting competition between the parties. The worker advertised via word-of-mouth. The firm represented the worker by his first name to its customers. The work relationship ended when the worker quit. The worker stated he did not perform similar services for others or advertise as he is not licensed for the work performed. The firm represented him as an employee to its customers. The work relationship ended when he asked the firm for unpaid income. The firm ended the work relationship.

---

## 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, the firm's statement that the worker was an independent contractor pursuant to a 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.

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 services performed by the worker were integral to the firm's business operation. The firm provided work assignments by virtue of the customers served and it assumed responsibility for problem resolution in order to keep its business reputation. 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, 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. As acknowledged by the firm, the worker did not incur economic loss or financial risk. 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.