

**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 March 2019 to June 2019 as a furniture assembler. The firm issued the worker Form 1099-MISC for 2019. The worker filed Form SS-8 as they believe they received Form 1099-MISC in error because they used the firm's supplies and materials to do their job and received daily instruction from the firm. There was no written agreement between the parties.

The firm's response states it provides network and technological installation as well as furniture installation for commercial locations. The work provided by the worker was casual labor on furniture installation. The firm feels that the worker was an independent contractor because the work provided was on an "as-needed" basis and was meant to be temporary.

The firm states that the worker was instructed to load, unload, and install furniture. The firm would contact the worker to see if they were available and then schedule them for work. The worker performed services on the firm's team of installers. If the worker encountered any problems or complaints during their job duties, they were required to contact the firm's manager for problem resolution. There were no reports required of the worker. The worker was requested to arrive at the warehouse, load furniture onto a rented truck, ride to the job site with the installation team, and then unload the furniture and install it at the destination. The worker provided labor services at the firm's warehouse and installation services at the furniture's destination. There were no meetings required of the worker. The firm states that the worker was casual labor. Substitutes and helpers were not applicable in the work relationship. The worker states that they received no training from the firm. The worker would adhere to the firm's instructions on packing boxes, furniture assembly, and where to install the furniture. The worker would receive job assignments the day before and was required to use a timeclock application to record their hours worked. The firm's management team determined the methods by which job assignments were performed and also assumed responsibility for problem resolution. There were no reports required of the worker. The firm's management team dictated the worker's schedule for each day. Jobs were performed at customer locations and the firm's warehouse. The worker would start out each morning by meeting with the firm to discuss the day's tasks. The worker was required to perform services personally. All helpers or substitutes were hired and paid by the firm.

The firm states that they provided the truck necessary for the job and the worker did not have to provide anything. The firm was unaware of any leasing required or expenses that the worker faced while performing services for the firm. The worker was paid an hourly wage with no access to a drawing account for advances. Customers would pay the firm directly for services rendered. The firm carried worker's compensation insurance on the worker. The worker had no exposure to economic loss or financial risk. The firm states that the market price for casual labor set the level of payment for services rendered. The worker states that the firm provided drills, screwdrivers, levels, hammers, mallets, and drill bits for the job and the worker did not have to provide anything or lease any space, equipment, or facilities. The worker had no expenses and was paid an hourly wage by the firm. Customers would pay the firm. The worker had no economic loss or financial risk and the firm set the level of payment for all services rendered.

The firm states that they did not offer the worker any benefits during the work relationship. The relationship between the parties could be terminated by either party without liability or penalty. The worker was not required to seek approval from the firm before performing similar services for other firms. There were no non-compete agreements in place. The worker was not a member of a union and did not advertise their services to the public. The firm states that they make no representation of their workers to customers. The work relationship ended when the worker found another job. The worker states that no employment benefits were offered by the firm. The worker states that they did not offer similar services to any other firm while working for the firm. The worker did not advertise their services to the public nor were they a member of a union. The worker states that the firm represented them as an employee of the firm. The work relationship ended when the worker received full-time employment from a different firm.

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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 of furniture installation. The firm provided work assignments by virtue of the customers served 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.