

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

Occupation

Construction/Technical Services/Trades

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 a home improvement company. The firm engaged the worker as a laborer from 2015 to 2019. The firm contended the worker wanted to be hired as a subcontractor and given a 1099-MISC for his services. The worker submitted a Form SS-8 after receiving a Form 1099-Misc from the firm. The firm replied with a Form SS-8.

The firm specified the worker received no training. The worker maintained he was told what to do and how to do it depending on the job site. He would receive his work assignments verbally. He stated the firm would determine the methods by which those assignments were performed. Both parties agree, the firm was responsible for problem resolution. There were no reports required from the worker. According to the worker, he would arrive at the firm's shop at 7:00 am daily. He would ride to the firm's job site with another worker in the firm's work vehicle. He would be instructed on what needed to be done for the day and was told when he could leave. However, the firm indicated the worker's hours were flexible as he was a subcontractor. The firm detailed he would spend 5% of his time at the firm's shop and 95% of his time on the premises of the firm's customers. He received regular remunerations for his services. The worker was not required to attend any meetings. The relationship between the parties was continuous, as opposed to a one-time transaction. The nature of this relationship contemplated that the worker would perform the services personally. The worker worked exclusively and on a continuing basis for the firm. The parties disagree of who was responsible for the hiring and paying of substitutes or helpers. The worker stated the firm did whereas the firm specified it was up to the worker since he was a subcontractor.

The worker did not furnish any of the tools or equipment used in performing the services, except for some small hand tools. The worker did not lease equipment. The firm provided the vehicle that the worker rode to each job site in thus, he did not have a significant financial investment in the firm's materials. The firm determined the fees to be charged. The worker did not incur any significant business expenses and was not reimbursed by the firm. The worker was paid an hourly wage. The firm did not allow the worker a drawing account, or advances against anticipated earnings. The firm's customers paid the firm. The firm did not carry worker's compensation insurance on the worker. The worker did not have a substantial investment in equipment or facilities used in the work and did not assume the usual business risks of an independent enterprise.

The worker was not eligible for sick pay, vacation pay, health insurance, or bonuses. Either party could terminate the work relationship at any time without incurring a penalty or liability. The worker was not a member of a union. All work produced became the property of the firm's customers. According to internal research, the worker did not perform the services for others. He did not advertise his services to the public, or maintain an office, shop, or other place of business. He was required to perform the services under the name of the firm and for the firm's customers. The parties disagree on how the work relationship ended. The worker stated he was given an option to sign a W9 or get done working for the firm. The firm contended the worker quit to go work somewhere else as a subcontractor.

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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. We must examine the relationship of the worker and the business. We consider 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. The degree of importance of each factor varies depending on the occupation and the context in which the services are performed.

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, co-adventurer, agent, or independent contractor must be disregarded.

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.

The firm's statement that the worker was an independent contractor pursuant to an 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.

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.

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.

The firm determined the rates charged to the customers and the customers paid the firm's business directly for the services provided by the worker. The worker was not allowed a drawing account against future earnings. The worker was provided remuneration in the form of an hourly wage and it was the firm who determined the worker's method of payment and paid the worker as an individual and not to a business account.

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, both parties retained the right to terminate the work relationship at any time without incurring a liability.

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.

Based on the common-law principles, the firm had the right to direct and control the worker. The worker shall be found to be an employee for Federal tax purposes.

Please see [www.irs.gov](http://www.irs.gov) for more information including Publication 4341 Information Guide for Employers Filing Form 941 or Form 944 Frequently Asked Questions about the Reclassification of Workers as Employees and Publication 15 (Circular E) Employer's Tax Guide.