

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

Occupation

03MIS Miscellaneous Laborers

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**

Information provided finds the firm is a wedding venue and vacation rental business. The firm stated she was initially hired as contract laborer with the understanding that if it worked out after a month she would be hired as an employee with more pay. (This is deemed to a probationary period) The firm was also waiting for guidance from her accountant as to how to correctly classifying a seasonal worker. The firm reported the income earned during this period on Form 1099-MISC. The firm stated once the accountant got back to her with the information she had requested, the worker was converted to employee status, and paid under the firm's other business entity. the firm stated during this initial period the worker was free to determine her own work schedule. Her duties were to create a land us plan for gardening, create pathways, maintain gardens do controlled burns etc. Either party could terminate the work relationship without incurring a penalty or liability. The firm indicated she was converted to employee status and paid under their other company. The worker quite shortly after.

The worker indicated she performed services as a landscaper, maintaining grounds and buildings, installing gardens, running errands for the firm. Services were performed for tax years 2015 and 2016. The firm reported income earned in 2015 on Form 1099-MISC. The work was dictated by the employer on a daily basis. She was given a list of instructions and order of tasks. Copies of e-mailed instructions were provided. The worker performed services from eight to five, Monday through Friday. The worker indicated the services were performed on the firm premises. Weekly meetings were required. She was required to perform her services personally. The worker indicated the firm provided all equipment and tools. She was paid by the hour. She was also given bonuses. The customer paid the firm. Either party could terminate the work relationship without incurring a penalty or liability. She was represented as an employee of the firm. The worker indicated she quite.

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**Analysis**

For a defined period of time, the worker was considered to be in a “probationary” status to allow the firm time to consider the merits of retaining the worker permanently, and no taxes were withheld from the income. Once the probationary period ended, taxes were withheld from the worker’s income without any meaningful change to the work relationship.

Probationary employees, even though they may not qualify for benefits, privileges, or seniority protection, still are considered employees for federal employment tax purposes. Payments made to them as compensation for services are wages subject to employment taxes. Additionally, the withholding of employment taxes from the worker’s wages is considered “treatment” of the worker as an employee, whether or not the tax is paid over to the Government. Since you withheld taxes from the worker’s income after the probationary period, and there was no meaningful change in the work relationship, you effectively assigned an employee status to the worker for the whole time services were performed for you. IRS has no exceptions specific to probationary pay and considers it to be services performed by an employee.

**Case Conclusion:**

Based on the information provided and common law I find the services to have been performed during a probationary period. The firm stated the intent was to convert the worker to an employee after one months time, if work was satisfactory. Probationary pay is deemed wages and subject to all applicable employment taxes and should always be reported on Form W-2. The fact the worker's schedule was flexible, and her work not as strictly directed by the firm does not indicate an independent contract relationship. The firm still maintained the right to do so in order to receive the desired results. The worker was paid by the hour throughout the work relationship. She did not own her own business (the first requirement of an independent contractor).