

**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 indicated the firm is a pool maintenance company. The worker performed serves for the firm as a pool maintenance person, acid washing and glass bead tile cleaning for tax years 2012 through 2017. The firm indicated the worker was always an independent contractor. The firm changed to an LLC in 2017. The firm consistently reported the income earned on Form 1099-MISC, stating there was a verbal agreement to do so. The firm indicated the worker made his own schedule. The firm stated there was no training since the worker had been with them since 2012. The firm stated the worker was given the route via calling/text. He would then give times he would be able to do a bid or day he could add another residence. If the worker could not resolve an issue he would contact the firm. Many times the client fired the company for what the worker had done on their property.

The firm indicated both the firm and worker provided poles, nets, chemicals, water hoses, pressure washer, tools, numerous items for pool and equipment. The firm indicated the worker was paid both on a piece work basis and lump sums. The firm stated the customer paid both the firm and worker for services. If the worker broke something on the clients property, he had to pay to fix it. The firm stated the company was closed during Thanksgiving and Christmas weeks. Either party could terminate the work relationship without incurring a penalty or liability. The firm indicated the worker left for another job.

The worker filed the SS-8 for services performed for the firm for tax years 2017 and 2018. He stated he performed all duties pertaining to the cleaning and services of private swimming pools. He stated he feels he was an employee as the firm set his schedule, the company provided the vehicle, all supplies and parts. He Indicated he started work in the morning and finished at night. No days or specific hours were provided. Services were performed at the firm's customer home. He was required to perform his services personally. The worker agreed he was paid on a piece work basis. He was also given paid vacations. He stated the customer paid the firm. Either could terminate the work relationship without incurring a penalty or liability.

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## Analysis

The question of whether an individual is an independent contractor or an employee is one that is determined through consideration of the facts of a particular case along with the application of law and regulations for worker classification issues, known as “common law.” Common law flows chiefly from court decisions and is a major part of the justice system of the United States. Under the common law, the treatment of a worker as an independent contractor or an employee originates from the legal definitions developed in the law and it depends on the payer’s right to direct and control the worker in the performance of his or her duties. Section 3121(d)(2) of the Code provides that the term “employee” means any individual defined as an employee by using the usual common law rules.

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.

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.

Therefore, your 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.

We have applied the above law to the information submitted. As is the case in almost all worker classification cases, some facts point to an employment relationship while other facts indicate independent contractor status. 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.

Evidence of control generally falls into three categories: behavioral control, financial control, and relationship of the parties, which are collectively referred to as the categories of evidence. In weighing the evidence, careful consideration has been given to the factors outlined below.

Factors that illustrate whether there is a right to control how a worker performs a task include training and instructions. In this case, you retained the right to change the worker’s methods and to direct the worker to the extent necessary to protect your financial investment.

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.

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 your business. 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. Both parties retained the right to terminate the work relationship at any time without incurring a liability.

## CONCLUSION

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. All work was performed on a continuing basis, under the firm’s business name. The firm had indicated they lost work from their customers, due to the negligence of the work performed by the worker. Had the worker been an independent contractor, he not the firm would have lost the business. The worker was paid on a piece work basis, indicating no opportunity for profit or loss. Services can be performed on a flexible schedule and still be an employee. The firm, not the worker still had the responsibility to contact their customer, for changes in the timeframe of a work order.