

SS-8 Determination—Determination for Public Inspection

Occupation 03MIS Miscellaneous Laborers	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 cleaning services performed for the firm from September 2016 to February 2018. The firm contracts to clean homes after construction. The firm issued the worker Form W-2 for 2016; Form W-2 and Form 1099-MISC for 2017; Form 1099-MISC for 2018. The worker stated the firm changed her employment status to independent contractor; however, there were no changes in the actual services performed. The worker filled out Form W-4 when she was initially hired and she believes she should have been classified as an employee for the entire work relationship. The worker filed Form SS-8 as she received both Form W-2 and Form 1099-MISC.

The worker submitted copies of documents received when the firm changed her classification to that of independent contractor. They state, in part, she would no longer be an employee of the firm but now classed as a subcontractor working for the firm. The worker's pay sheet was to be turned in no later than Wednesday of each week and needed to list the date (work was completed), the builder, the site address, and the type of cleaning performed. The firm could provide her IRS tax vouchers if needed. She was reminded to keep receipts for fuel and supplies (for tax deduction), in addition to an IRS required mileage log. The firm also informed cleaning crews they had to call the office at end of day to inform them which houses were completed and which houses were not completed. In order for the firm to operate efficiently and organized, it needed communication from its workers. There was no written agreement between the parties.

The firm's response states its business is new construction cleaning services for residential and commercial properties. The worker was engaged as a cleaning tech. The work done by the worker included providing cleaning services for the firm's customers. In 2017, the firm made changes resulting in existing workers and new hires being classified as independent contractors as the firm's daily operations do not demonstrate or meet the tests of having an employer-employee relationship. A scope of work is issued by building contractors for services to be performed. The firm does not provide training, instruction, or benefits. The firm provides workers a specifications sheet which documents the required cleaning services to meet the customers requests. Workers call the firm daily to obtain a list of homes needing cleaning services. The list also documents the required completion date for services to be performed. Workers have control over work hours and work methods/processes. They have a significant investment in equipment and supplies used. Workers incur expenses associated with travel and hiring helpers or assistants. Workers are paid based on a per square foot rate and the type of cleaning services requested by the customer. Workers have an opportunity for profit or loss. Workers cannot quit or be fired at will. In March 2017, the worker requested to be hired/contracted as an independent contractor, having all the requirements in place such as licenses and insurances. She refused to sign the firm's documents, therefore, she did not qualify as an employee. There was no written agreement between the parties.

The firm stated it did not provide specific training or instruction to the worker. She received work assignments as dispatched and determined the methods by which assignments were performed. The firm's office was contacted if problems or complaints arose. The firm was responsible for problem resolution. For payment purposes the firm required the worker to provide invoices. The worker's daily routine was at her discretion. Services were performed at customer locations. Meetings were not required. The firm required the worker to personally perform services. The firm's approval was required if substitutes or helpers were hired by the worker. The worker was responsible for paying substitutes or helpers. The worker stated another employee initially trained her for one week. Work assignments were received daily either by text message or phone call. The firm's president determined the methods by which assignments were performed and assumed responsibility for problem resolution. The firm hired and paid substitutes or helpers as she could not hire anyone.

The firm stated the worker incurred the unreimbursed expense associated with equipment, supplies, and travel. She did not lease equipment, space, or a facility. Customers paid the firm. The firm paid the worker per square foot cleaned; a drawing account for advances was not allowed. The firm carried workers' compensation insurance on the worker as required by its customers. The customer established the level of payment for the services provided. The worker stated the firm would loan a vacuum, if needed, or finance purchases for new hires. The firm determined the level of payment for the services provided.

Benefits were not provided. The work relationship could be terminated by either party without incurring liability or penalty. The worker did not perform similar services for others or advertise. There was no agreement prohibiting competition between the parties. The firm stated it represented the worker as an independent contractor to its customers. Services were performed under the firm's business name. The work relationship ended when the firm was no longer in need of services and the worker no longer wished to be of service. The worker stated the firm requested she sign a non-compete in December 2017; however, she refused to do so. The firm represented her as an employee to its customers. She never requested to be

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 cleaning services performed by the worker were integral to the firm's business operation. The firm provided work assignments by virtue of its customers, required the worker to report on transactions completed, 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 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.

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. The opportunity for higher earnings or of gain or loss from a commission arrangement is not considered profit or loss. 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 per square foot 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 for the entire work relationship, 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; Publication 4341.