

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

Occupation 03MIS Laborer	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 payer from July 2018 to October 2018 as a general laborer. The work done by the worker included clean-up, assisting in measuring and cutting materials, and some assistance in building structures. The payer issued the worker Form 1099-MISC for the year in question. The worker filed Form SS-8 as he believes he erroneously received Form 1099-MISC.

The payer's response states it is a construction business. The worker was engaged as a laborer. He was classified as an independent contractor as he was used based on his availability. There was no written agreement between the parties.

The payer stated it did not provide the worker specific training or instruction. Work assignments were based on the worker's availability. The customer determined the methods by which assignments were performed. The payer was contacted and assumed responsibility if problems or complaints arose. Reports and meetings were not required. The worker's routine was based on the job. Services were performed at customer locations. The payer required the worker to personally perform services. The payer was responsible for hiring substitutes or helpers. The worker stated the payer provided specific training and instruction related to how to use tools, how jobs were to be performed, and when to arrive, take breaks, and go home. The payer provided work assignments via text message or phone call. The payer determined the methods by which assignments were performed. His routine varied based on the payer's needs.

The payer stated it provided all supplies, equipment, and materials. The worker did not lease equipment, space, or a facility. The worker did not incur expenses in the performance of services for the payer. Customers paid the payer. The payer paid the worker piece work; a drawing account for advances was not allowed. The payer did not carry workers' compensation insurance on the worker. The worker did not incur economic loss or financial risk. The payer established the level of payment for the services provided. The worker stated the payer paid him an hourly rate of pay.

The payer stated benefits were not provided. The work relationship could be terminated by either party without incurring liability or penalty. It is unknown if the worker performed similar services for others or advertised. There was no agreement prohibiting competition between the parties. The payer represented the worker as a helper to its customers. The work relationship ended when the job was completed. The worker stated he did not perform similar services for others or advertise. The payer represented him as an employee to its customers. Services were performed under the payer's business name. The payer terminated the worker for tardiness.

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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 payer required the worker to personally perform services. Furthermore, the services performed by the worker were integral to the payer's business operation. The payer provided work assignments and assumed responsibility for problem resolution. These facts evidence the payer retained the right to direct and control the worker to the extent necessary to ensure satisfactory job performance in a manner acceptable to the payer. Based on the worker's past work experience and work ethic the payer may not have needed to frequently exercise its right to direct and control the worker; however, the facts evidence the payer 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 payer's customer for poor work, the payer shares the risk of such loss. Control of the payer over the worker would be necessary in order to reduce the risk of financial loss to the payer. 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. As acknowledged by the payer, the worker did not incur economic loss or financial risk. Based on the piece work or 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 payer'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 payer 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 payer can obtain additional information related to worker classification online at [www.irs.gov](http://www.irs.gov); Publication 4341.