

**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**

The worker submitted a request for a determination of worker status in regard to services performed for the firm from March 2018 to April 2018 as a personal assistant. The firm issued the worker Form 1099-MISC for 2018. The worker filed Form SS-8 as they believe they received Form 1099-MISC in error. The worker provided copies of a court case between the firm and the worker, an independent contractor agreement between the two parties, expense reports, invoices, emails, and copies of pay documents for our consideration.

The firm's response states it is an individual that operates a software company. The work provided by the worker was that of personal assistant to the firm's owner. The worker was requested to perform personal tasks for the firm owner such as shopping or cleaning. The firm states that the worker was an independent contractor because they had control over how to perform their job assignments, invoiced the firm, and was hired by the firm's owner and not the corporation.

The firm states that there was no training or instruction applicable to the work relationship between the firm and the worker. The firm states that the worker received job assignments verbally by phone. The firm states that the worker determined the methods by which job assignments should be performed. The firm states that reports and problem resolution were not applicable to the work relationship, and the worker determined their own schedule. The firm states that the worker determined their location where they wished to perform services. There were no meetings that the worker had to attend. The firm states that the worker did not have to perform all services personally and if helpers or substitutes were needed, the worker was responsible for determining who to hire and pay. The worker states that they were given very specific instructions by the firm owner on every aspect of job duties and did not have free will to accomplish their work assignments any other way than how the firm owner determined they be performed. The worker provided copies of the agreements the firm had provided to them detailing specific instructions regarding job duties and how they should be performed to demonstrate this fact. Additional documentation provided by the worker included a court case that also details this information and states how specific instructions were given to the worker on their job performance and all included aspects. The worker states that they were required to contact the firm owner if there were any problems that arose during job duties. The worker states that they were required to text the firm owner after job assignments were completed. The worker states that they usually performed services starting at Friday in the morning and would work additional hours on different days as the firm owner needed them. The worker states that they performed 10% of the work duties off-site running errands and 90% of the time in the firm owner's home performing services. The worker states that there were no meetings required, and they were required to perform all services personally. Helpers and substitutes were not applicable in the work situation.

The firm states that the firm did not provide the worker with any materials, supplies, or equipment to perform their job, and the worker was responsible for determining what they needed and providing it for their responsibilities. The firm states that the worker had to lease space, equipment or facilities as they determined their need for their job. The firm states that they paid the worker based upon invoices received and the worker did not have access to a drawing account for advances. As the worker was a personal assistant to the firm's owner, there were no applicable customers involved with the work relationship. The worker faced the economic loss of damage to person or property during job duties. The worker states that all materials, supplies and equipment were provided by the firm, including cleaning supplies, organizational items, iron, and gloves. The worker states that they did not have to lease space, equipment or facilities. The worker states that occasionally they would pay for items for their job duties and the firm owner would reimburse them for these expenses. The worker provided copies of expense reports for items purchased for the firm. The worker was paid an hourly wage and did not have access to a drawing account for advances. The worker states that the firm did not carry worker's compensation on the worker, and the firm's owner set the level of payment for all services rendered.

The firm states that they did not provide the worker with any benefits, and the work relationship could be terminated at any time without incurring loss or liability. The firm states that the worker performed similar services for other firms at the time they worked for the firm. The firm states that there were no agreements in place prohibiting competition between the firm and the worker. The worker was not a member of a union, and the worker also determined what type of advertising they would do, if any. The firm states that there was no applicable representation of the worker to any clients. The firm states that the worker was discharged from services because they damaged property, stole items, and fraudulently invoiced the firm. The worker states that they did not perform similar services for any other firm at the time that they worked for the firm. The worker states that they did not advertise their services to the public. The worker states that the work relationship was terminated when they were fired through a voicemail message.

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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 firm required the worker to personally perform services. The firm provided work assignments with detailed instructions regarding how the worker was to perform each task and required reporting on each task's completion. 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 education, 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.

Payment by the hour, day, 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. Also, workers are assumed to be employees if they are guaranteed a minimum salary or are given a drawing account of a specified amount that need not be repaid when it exceeds earnings. In this case, the worker did not invest capital or assume business risks. The firm also reimbursed the worker for expenses involved in the performance of job duties. 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 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 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, 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](http://www.irs.gov); Publication 4341.