

**SS-8 Determination—Determination for Public Inspection**Occupation  
03MIS LaborerDetermination:  
☒ 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 January 2016 to December 2018 as a laborer. The services performed included general construction. The firm issued the worker Form 1099-MISC for 2016, 2017, and 2018. The worker filed Form SS-8 as he believed he should have received Form W-2.

The firm's response, states its business is a general construction company. The worker was engaged as general labor. The services performed included general construction work. The worker was classified as an independent contractor as the worker set his own schedule and worked only when he was in town or called wanting work. The worker provides his own transportation and hand tools. The firm has issued Form 1099-MISC each year he had worked as a subcontractor. The worker verbally agreed he was an independent contractor.

The firm stated it did not provide training as the firm's owner was always on the job site to provide direction as to how the worker could help. The firm provided work assignments verbally. The worker determined the methods by which assignments were performed. If complaints or problems arose, the firm would be informed and then the customer as needed. Both the firm and the worker assumed responsibility for problem resolution. Reports included project updates, problems, resolutions, and amount owed to the worker for hours worked. The worker performed services when he wanted to. Services were performed at the customer location. Meetings were not required. The firm did not require the worker to personally perform services. The firm was responsible for hiring substitutes or helpers. The worker stated the firm determined the methods by which assignments were performed. Services were performed from 8:00 am until 5:00 pm. The firm was responsible for paying substitutes or helpers.

The firm stated it provided major equipment such as lifts, an excavator, a skid steer, and general supplies. The customer's ordered all materials. The worker did not lease equipment, space, or a facility. The worker incurred the unreimbursed expenses of transportation, tools, maintenance, and insurance. Customers paid the firm. The firm paid the worker an hourly rate of pay; a drawing account for advances was not allowed. The firm did not carry workers' compensation insurance on the worker. The worker's economic loss or financial risk would have been if any damage or error had occurred, if injured on the job, and if tools were damaged or stolen. The firm established the level of payment for the services provided. The worker stated he did not incur economic loss or financial risk.

The firm stated the work relationship could be terminated without penalty. The worker did perform similar services for others and the firm's approval was not required. There was no agreement prohibiting competition between the parties. It was unknown if the worker advertised. The firm represented the worker as a contractor to its customers. The work relationship ended when the worker left to do another construction project on his own. The worker stated he did not advertise. The firm represented the worker as an employee to its customers. Services were performed under the firm's business name. The work relationship ended when the worker was fired.

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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, the firm's statement that the worker was an independent contractor pursuant to a 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.

A worker who is required to comply with another person's instructions about when, where, and how he or she is to work is ordinarily an employee. This control factor is present if the person or persons for whom the services are performed have the right to require compliance with instructions. Some employees may work without receiving instructions because they are highly proficient and conscientious workers or because the duties are so simple or familiar to them. Furthermore, the instructions, that show how to reach the desired results, may have been oral and given only once at the beginning of the relationship. In this case the firm's owner was at each job to provide instruction. The firm provided work assignments verbally and ultimately 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 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 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.