

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

Occupation

Construction/Technical Services/Trades

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 is seeking a determination of worker classification for janitorial services performed for the firm from January 2014 until December 2014. The worker received a 1099-MISC from the firm for tax year 2014. The worker believes that they were misclassified as an independent contractor because they worked a set schedule, were paid hourly, and performed services as an employee of the firm. There were no written agreements between the parties. The worker provided a copy of a doctor's note indicating an on the job injury and a determination from the department of labor.

The firm states that it is a church. The worker was requested to clean the church's buildings. The firm did not provide a reason as to why they classified the worker as an independent contractor.

The firm states that the worker was instructed to clean the church's building. The firm's manager assigned the worker job tasks and determined how they were performed. If the worker encountered any problems or complaints while working, they were required to contact the firm's manager for problem resolution. The worker was required to provide the firm with timesheets. The worker was requested to perform cleaning duties for 6 hours every day. All job duties were performed at the firm's church. The worker was not required to perform services personally. The worker states that they were requested to work every day, to open and close the facility, and the worker had the alarm access code and a company phone. Instructions were given by the firm's supervisor and assistant supervisor. The firm determined the methods used for job duties and assumed responsibility for problem resolution. The worker was required to provide the firm with reports on supply inventory as well as timesheets. The worker performed services from 3pm until 11pm 7 days a week and was also responsible for covering shifts for sick workers. The worker performed all services on the church's campus and was required to attend staff meetings. The worker was required to personally perform services. The firm's front office staff was responsible for hiring any helpers needed, and the church was responsible for paying helpers and substitutes.

The firm states that it provided the worker with all supplies needed for their job duties. The worker did not lease any space, facilities, or equipment. The firm paid the worker an hourly wage with no access to a drawing account for advances. Customers were not applicable. The firm did not carry worker's compensation insurance on the worker. The firm states that the worker established the level of payment for services. The worker states that the firm provided all materials, supplies, and equipment needed, and the worker incurred no expenses. The firm paid the worker an hourly rate. The firm did not carry worker's compensation insurance and when the worker got hurt on the job, the firm wrote the worker a check for compensation. The firm established the level of payment for services provided.

The firm states that the relationship between the parties could be terminated by either party without liability or penalty. The worker did not perform similar services for other firms and there were no non-compete agreements between the parties. The worker was not a member of a union and did not advertise their services to the public. The firm let the worker go and the relationship between the parties was terminated. The worker states that they were provided with paid vacations, sick pay, and bonuses. The worker states that they did not advertise services to the public. The worker states that they were represented by the firm as an employee performing services under the firm's name. The worker was terminated by the firm.

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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. Furthermore, the services performed by the worker were integral to the firm's business operation. The firm provided work assignments through the firm's supervisor, required the worker to report on services performed, 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 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.