

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

Occupation 03MIS.40 MiscLaborServices	Determination: <input checked="" type="checkbox"/> Employee <input type="checkbox"/> Contractor
UILC	Third Party Communication: <input checked="" type="checkbox"/> None <input type="checkbox"/> Yes

**Facts of Case**

The worker submitted a request for a determination of worker status in regard to services performed for the firm from November 2013 to March 2014 as a seasonal laborer performing snow removal services. The firm issued the worker Form 1099-MISC for 2014; no tax reporting document was issued for 2013. The worker filed Form SS-8 as he believes he erroneously received Form 1099-MISC. Also, the amount reported for 2014 was incorrect as it included earnings from 2013. The worker believes he was an employee as the firm provided all equipment and supplies, in addition to establishing all clients. The worker only provided labor. There was no written agreement between the parties.

The firm's response stated its business is snow removal. The worker was engaged to perform sidewalk snow removal. The firm believes the worker was an independent contractor as he was contracted to perform snow removal for specific customers after a snow event. Total days expected to perform services annually were five to eight days total; however, it was possible the worker may not have performed services. The worker was asked to sign documents to establish the terms of the work relationship; however, signed documents were never returned.

The firm stated it did not provide specific training or instruction to the worker. The worker was given a route. The worker determined the methods by which assignments were performed. The firm was contacted if problems or complaints arose. The worker was responsible for resolution. Reports and meetings were not required. The worker set his own schedule to perform designated projects. Services were performed at customer locations. The time depended on the size of the facility. The firm required the worker to personally perform services. The worker could have hired substitutes or helpers. The firm ultimately would have paid substitutes or helpers. The worker stated the firm provided instruction on how much salt to put in the spreader and provided a map of the location. The worker was called and told where to remove snow. The firm determined the methods used and ultimately assumed responsibility for problem resolution. There were no reports, just a phone call. The worker was on call 24/7 depending on the weather.

The firm stated it provided ice melt and snow shovels, if needed. The worker also provided snow shovels. The worker did not lease equipment, space, or a facility. The worker incurred the expense of travel to job locations. The firm sometimes reimbursed the worker for fuel. Customers paid the firm. The firm paid the worker an hourly rate of pay and piece work; a drawing account for advances was not allowed. The firm did not carry workers' compensation insurance on the worker. The worker did not incur economic loss or financial risk. The firm negotiated each job individually to establish the level of payment for the services provided. The worker stated he provided only his labor. He did not incur expenses in performing services for the firm.

Benefits were not made available to the worker. The work relationship could be terminated by either party without incurring liability or penalty. The worker was not responsible for soliciting new customers. The firm stated it is unknown if the worker performed similar services for others or advertised. There was no agreement prohibiting competition between the parties. The firm represented the worker as a contractor to its customers. Services were performed under the firm's business name. The work relationship ended when the worker failed to call requesting a route for the next snow event. The worker stated he did not perform similar services for others or advertise. The firm represented him as an employee to its customers.

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## Analysis

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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.

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 snow removal services performed by the worker were integral to the firm's snow removal business operation. The firm provided work assignments and was contacted if problems or complaints arose to presumably provide instruction related to 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; however, the facts evidence the firm retained the right to do so if needed.

Payment by the hour, 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 and as acknowledged by the firm, the worker did not incur economic loss or financial risk.

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.