

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

Occupation 03PMW Repair/Maintenance Workers	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**

Information provided indicated the firm is a janitorial service business. The worker provided cleaning services for the firm's clients on a part time basis. The firm reported the income on Form 1099-MISC for tax years 2016 and 2017. The firm indicated they felt the worker was an independent contractor as he worked different schedules. The firm indicated training instead of services were provided. Work assignments were given via phone or text. The firm manager determined how the work was performed and resolved any issues or complaints. The firm indicated the worker cleaned places with other staff, for approximately 5 hours a day. Staff meetings were required. The firm hired and paid all workers. The firm indicated the worker was required to perform services personally. The firm indicated it provided the vacuum cleaner, PPE, chemicals and uniforms. The worker did not lease space or equipment. The firm indicated the worker was paid on salary. The firm indicated the customer paid the firm. The firm did carry workmen's compensation insurance. The firm indicated the worker received bonuses, paid vacations and sick pay. Either party could terminate the work relationship without incurring a penalty or liability. The worker did not perform similar services for others. The firm indicated the worker was represented as an employee. The firm indicated the worker resigned.

The worker indicated he was instructed how to safely and properly clean the facilities. He indicated work assignments were given word of mouth by his supervisor. Any issues or complaints he would report to the supervisor. He indicated he worked five days a week, hours ranged between twenty-two to twenty-five hours. Services were performed at various firm client locations. He agreed he was to perform services personally. He agreed the firm provided the equipment and cleaning supplies. He indicated he was paid by the hour. He agreed the client paid the firm. Either party could terminate the work relationship without incurring a penalty or liability. He agreed he was represented as an employee of the firm. As of March 2018 he was still employed by the firm.

**ANALYSIS**

The question of whether an individual is an independent contractor or an employee is one that is determined through consideration of the facts of a particular case along with the application of law and regulations for worker classification issues, known as "common law." Common law flows chiefly from court decisions and is a major part of the justice system of the United States. Under the common law, the treatment of a worker as an independent contractor or an employee originates from the legal definitions developed in the law and it depends on the payer's right to direct and control the worker in the performance of his or her duties. Section 3121(d)(2) of the Code provides that the term "employee" means any individual defined as an employee by using the usual common law rules.

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.

In determining whether an individual is an employee or an independent contractor under the common law, all evidence of both control and lack of control or independence must be considered. We must examine the relationship of the worker and the business. We consider facts that show a right to direct or control how the worker performs the specific tasks for which he or she is hired, who controls the financial aspects of the worker's activities, and how the parties perceive their relationship. The degree of importance of each factor varies depending on the occupation and the context in which the services are performed.

-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.

-A continuing relationship between the worker and the person or persons for whom the services are performed indicates that an employer-employee relationship exists. A continuing relationship may exist where work is performed in frequently recurring although irregular intervals. The establishment of set hours of work by the person or persons for whom the services are performed is a factor indicating control. If the nature of the occupation makes fixed hours impractical, a requirement that workers be on the job at certain times is an element of control.

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## Analysis

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We have applied the above law to the information submitted. As is the case in almost all worker classification cases, some facts point to an employment relationship while other facts indicate independent contractor status. The determination of the worker's status, then, rests on the weight given to the factors, keeping in mind that no one factor rules. The degree of importance of each factor varies depending on the occupation and the circumstances.

Evidence of control generally falls into three categories: behavioral control, financial control, and relationship of the parties, which are collectively referred to as the categories of evidence. In weighing the evidence, careful consideration has been given to the factors outlined below.

Factors that illustrate whether there is a right to control how a worker performs a task include training and instructions. In this case, you retained the right to change the worker's methods and to direct the worker to the extent necessary to protect your financial investment. The worker was provided training by the firm and was given work assignments directly from the firm.

Factors that illustrate whether there is a right to direct and control the financial aspects of the worker's activities include significant investment, unreimbursed expenses, the methods of payment, and the opportunity for profit or loss. In this case, the worker did not invest capital or assume business risks, and therefore, did not have the opportunity to realize a profit or incur a loss as a result of the services provided.

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 your business. Both parties retained the right to terminate the work relationship at any time without incurring a liability.

## CONCLUSION

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 fact the schedule may vary or may have been part time does not indicate the worker is an independent contractor. The firm indicated it provided all equipment and supplies as well as a company uniform. Whether paid by weekly salary or by the hour indicated the worker had no opportunity for profit or loss. The firm stated the worker was given bonuses, vacation and sick pay, and stated the worker was an employee of the firm. Therefore, the income should have been reported on Form W-2 with applicable employment taxes withheld.