

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

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| Occupation<br>03PMW Repair/Maintenance Workers | Determination:<br><input checked="" type="checkbox"/> Employee <input type="checkbox"/> Contractor  |
| UILC   | Third Party Communication:<br><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**

The worker submitted a request for a determination of worker status in regard to services performed for the firm from December 2017 to March 2019 as a janitor. The firm issued the worker Form 1099-MISC for 2018 as there were not enough earnings from the firm in 2017 and 2019. The worker filed Form SS-8 as they believe they received Form 1099-MISC in error. There was no written agreement between the parties. The worker believes they were misclassified because the firm provided all of the supplies and materials for the job responsibilities and provided training and instruction for the job duties.

The firm's response states it provides cleaning services. The work provided by the worker was janitorial. The worker was requested to empty trash bins, dust, vacuum and mop at their worksite. The firm states that the worker did not provide services prior to working for the firm during the term mentioned.

The firm states that the worker received on the job training. The worker received job assignments verbally from the firm owner. The firm owner determined the methods by which job assignments were performed and assumed responsibility for problem resolution. The only reports that the worker had to provide to the firm owner were anything related to job-related problems. The worker performed cleaning services for the firm 4 hours daily for five days a week. There were no meetings required of the worker and the worker did not have to personally perform services. The worker states that they showed up for their job on a regular basis and the firm owner gave them cleaning tasks that they had to perform. The worker states that the firm owner determined the methods by which job assignments were performed and assumed problem resolution responsibility. The worker states that they were not required to provide reports. The worker states that they were not required to attend meetings or perform services personally. If helpers or substitutes were needed, the firm owner was responsible for hiring and paying them.

The firm states that the worker did not have to provide any supplies, material, or equipment for their job responsibilities. The worker did not have to lease space, facilities, or equipment. There were no expenses incurred by the worker during their job duties. The worker was paid an hourly wage and did not have access to a drawing account for advances. Customers would pay the firm for all services rendered. The firm carried worker's compensation insurance on the worker. The worker would be held liable for any facility damage that was incurred during their job duties. The firm states that the worker set the level of payment for all services rendered. The worker states that the firm provided all cleaning supplies, soap, toilet paper, paper towels, vacuums, and brooms for the job duties. The worker only provided the services to the firm and no materials, supplies, or equipment. The worker was paid an hourly wage with no access to a drawing account for advances. Customers paid the firm, and the worker did not have exposure to financial loss or economic risk during their job duties. The firm's owner set the level of payment for all services rendered.

The firm states that there were no benefits provided to the worker during the work relationship. The work relationship could be terminated at any time without incurring loss or liability. The worker did not perform similar services for any other firm while working for the firm. There were no agreements prohibiting competition between the worker and the firm. The worker was not a member of a union. The firm states that they represented the worker as an employee to customers. The work relationship ended when the worker quit. The worker states that they did not perform similar services for any other firm while working for the firm. There were no agreements regarding competition between the parties. The worker never advertised their services to the public nor did they assemble anything for the firm. The worker states that they were represented as an employee by the firm. The work relationship ended when the worker quit.

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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. The services performed by the worker were integral to the firm's business operation. The firm provided work assignments by virtue of the customers served, required the worker to report on services performed, and assumed responsibility for problem resolution. The firm provided instruction and direction regarding the job assignments performed by the worker. 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 provided all supplies, materials, and equipment for the 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 firm represented the worker as an employee of the firm to its clients. 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.