

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

Occupation

03PMW Repair/Maintenance Workers

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 submitted a request for a determination of worker status in regard to services performed for the firm from January 2010 to December 2019 as a cleaner. The firm issued the worker Form 1099-MISC for 2019. The worker filed Form SS-8 as they believe they received Form 1099-MISC in error since the firm owner directed and controlled the worker, provided all supplies and equipment needed, required the worker to wear a company uniform, and told the worker when to complete the job. There was no written agreement between the parties.

The firm's response states it is a residential and commercial cleaning company. The work provided by the worker was cleaning. The worker was requested to perform cleaning functions for interior residential and commercial properties. The firm believes the worker was an independent contractor because the worker was on call.

The firm states that they would discuss with the worker what cleaning would need to be done ahead of any job assignments. The worker received job assignments through the firm and the firm determined the methods by which job assignments were performed. If the worker encountered any problems or complaints during their job duties, they were required to contact the firm owner for problem resolution. The worker was not required to provide any reports to the firm. The worker would perform services on an as-needed basis, roughly 2 to 3 hours per assignment. All work was performed at customer locations. There were no staff meetings that the worker was required to attend. The worker was not required to perform services personally. The firm was responsible for hiring and paying any additional help or substitutes needed. The worker states that the owner of the firm demonstrated how to use the cleaning supplies and equipment needed for their job duties. The firm owner would supervise the worker while instructing them where to clean for each job. The firm would send the worker a schedule either verbally or through text that stated dates and customer locations that needed to be cleaned. The firm owner determined the methods by which these job assignments were performed and also assumed responsibility for problem resolution. The worker was required to verbally report on tasks performed at each cleaning. The worker would arrive at a designated time at the customer location, await the firm owner and company van, unload the van and commence cleaning the property. After cleaning was done, the van was replenished and their shift would end. The worker attended a networking meeting with the firm owner but there were no penalties for not attending. The worker was required to perform services personally. The firm owner was responsible for hiring and paying any helpers needed.

The firm owner states that they provided all cleaning supplies and machines and the worker did not have to provide anything. The worker did not have to lease any space, facilities, or equipment. The worker did not incur any expenses. The worker was paid an hourly wage by the firm and would sometimes receive a lump sum for jobs performed. The worker had no access to a drawing account for advances. Customers paid the firm. The firm did not carry worker's compensation insurance on the worker. The worker faced no economic loss or financial risk. The firm set the level of payment for services rendered. The worker states that the firm provided a uniform, snacks, beverages, and all supplies and equipment needed. The worker only had personal expenses unrelated to the job. The worker was paid an hourly wage by the firm with no access to a drawing account for advances. Customers paid the firm. The only economic loss the worker faced was the possibility of lost wages. The firm owner set the level of payment for services rendered.

The firm states that they did not provide any benefits to the worker. The relationship between the parties could be terminated by either party without liability or penalty. The worker did not perform similar services to other firms during the work relationship. 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 worker was represented by the firm as an employee performing services under the firm's name. The work relationship ended when the firm stopped calling the worker to offer job assignments. The worker states that they were provided with bonuses as a benefit. The worker states that the firm owner required the worker to refer any job offers to the firm so that the firm could take the work as an assignment instead of the worker performing services directly for a client. The worker did not advertise their services to the public and was represented as an employee to the firm's customers.

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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 of cleaning services. 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. 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.