

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

Occupation 03PMW Janitor	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**

The worker is seeking a determination of worker classification for services performed as a janitor for the firm from January 2019 until December 2019. The worker received a 1099-MISC from the firm for 2019. The worker feels they were misclassified as an independent contractor because they did not run their own business and were under the supervision of another of the firm's employees while performing their job duties. There were no written agreements between the parties.

The firm states that it is a religious organization. The worker was requested to perform janitorial services for the church. The firm feels that the worker was an independent contractor because the worker's schedule was inconsistent, and the worker could determine the hours that they worked.

The firm states that the worker was trained by the firm's facility director. The facility director would designate tasks to the worker based upon the needs of the facility at the time. The firm's facility director would determine the methods by which tasks were performed. If the worker encountered any problems or complaints while working, they were required to contact the facility director for problem resolution. There were no reports required of the worker. The worker's tasks varied from trash removal and floor cleaning to setting up tables and chairs. All job duties were performed at the church building. There were no meetings required of the worker. The firm states that the worker was required to personally perform services. If substitutes or helpers were needed, the firm's facility director was responsible for hiring the workers and the firm was responsible for paying any help needed. The worker states that direction and work assignments were given by a fellow church employee. This same employee would be responsible for determining the methods by which jobs were performed and assumed responsibility for problem resolution. The worker states that they performed services for the firm approximately 10 hours weekly, doing a regular cleaning routine and setting up/tearing down chairs and tables in various rooms as needed. The worker states that all jobs were performed at the church location. The worker would sometimes have instructional meetings with the firm's employee, their supervisor. The worker was required to perform services personally. The firm hired and paid all helpers needed.

The firm states that they provided janitorial supplies, a vacuum, and a floor cleaner. The worker provided nothing and did not lease any space, facilities, or equipment. The firm states that the worker incurred no expenses. The firm paid the worker an hourly wage with no access to a drawing account for advances. The firm states that they carried worker's compensation insurance on the worker. The worker faced no economic loss or financial risk during their job duties. The firm's board of stewards and the executive pastor set the level of payment for services provided. The worker states that everything was provided by the firm and the worker did not have to provide anything for their job duties. The worker states that they incurred no expenses during their job duties. The worker was paid an hourly wage with no access to a drawing account. The worker states that there was no exposure to economic loss or financial risk. The worker states that the firm set the level of payment for services provided.

The firm states that they did not offer the worker any benefits. The work relationship between the parties could be terminated by either party without liability or penalty. The firm states that they were unaware if the worker performed similar services to other firms, but the worker did not need approval from the firm to do so. 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 states that the worker quit, thus the work relationship ended. The worker states that the firm did not offer any benefits. The work relationship between the parties could be terminated by either party without liability or penalty. The worker states that they did not perform similar services for other firms during the work relationship. The worker was not a member of a union and did not advertise their services to the public. The worker states that the firm represented the worker as an employee. The worker did not describe how the work relationship ended.

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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 by virtue of the needs of the firm's facility, oversaw the worker's job duties through supervision and direction, 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.