

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

Occupation

03PMW.73 RepairMaintenanceWorker

Determination:

☒ Employee☐ Contractor

UILC

Third Party Communication:

☒ None☐ Yes**Facts of Case**

The firm is in the business of professional window cleaning, including mirrors, shower doors, pressure washing, solar panels, hard water stains, and screens. The worker was engaged by the firm to perform cleaning services. The firm reported the worker's remuneration on Forms 1099-MISC for 2011 through 2014. The firm required the worker to obtain a Federal employer identification number (FEIN), and reported remuneration paid to him under his FEIN in 2014.

Agreements between the parties state that the worker wished to become an independent contractor and the firm wished to engage an independent contractor, and therefore, the worker accepted the conditions and terms of the agreement. The firm trained the worker and declared the value of the training at \$20,000, for which the worker was required to reimburse the firm: for each year the worker performed services, \$10,000 was deducted from the balance, or monthly at 1/12 the yearly deduction. If the worker provided services for another firm, individual, or himself, the balance for training could have become due and payable. The firm provided the worker with his work assignments and the methods by which to perform them. Services were subject to supervision, inspection, and approval of the firm to ensure satisfactory performance. The worker was to furnish all materials, equipment, and vehicles necessary to carry out his duties. The firm provided the worker a rental truck with the firm's name on it, containing specialized equipment, for \$100 per month; the firm paid the worker \$100 per month to promote the firm by driving the truck in public and private places. The firm required the worker to take the truck to the stated businesses for maintenance services, and advised him what to do at every fill-up. The firm provided the worker with a vehicle maintenance book and required him to submit the daily maintenance report at the end of each week when picking up his check. He was required to carry automobile insurance relating to the use of any vehicle operated by the worker, and public liability insurance to protect the worker and the firm. The firm agreed to provide the worker with up to 10 shirts per year with the firm's name at the rental cost of \$100 per year; the firm paid the worker \$100 per year to promote the firm by wearing shirts with firm's name in both public and private places. The firm paid the worker on a commission basis. It required the worker to sign a non-competition agreement stating that the worker may not solicit, during the time of the agreement and for 20 years after, the firm's customers or workers. Either party could have terminated the agreement with three days' notice, or immediately by the firm upon the stated conditions, or immediately by the worker if the firm failed to make payments to the worker.

If problems or complaints occurred, the worker was to handle, and if possible, fix or address the matter. If the worker did not have sufficient training to handle the matter, he would contact the firm for additional training. The worker was required to provide the firm with daily updates, and any comments, confirming the job was completed. He provided weekly invoices for services provided. The firm booked jobs according to the hours the worker was available. It notified the customers whether the worker would arrive before or after 12 noon, depending upon whether the worker had other jobs before theirs. According to the firm, the worker had no set hours per day; he was available to work anytime except when he had his own jobs scheduled on the weekend. The worker performed his services at customers' locations. The firm required the worker to attend one mandatory training meeting if he intended to perform services for the firm. The worker stated that all work was performed in teams. The firm stated that the worker was not required to perform his services personally, and would have been responsible for paying any help he hired.

Information submitted shows the firm bid on jobs. It provided the worker with a cell phone and business cards. The worker provided his personal tools and supplies. The firm afforded the worker the ability to negotiate a higher commission rate. It reduced the worker's remuneration for any customers' complaints. Customers paid the firm directly at prices established by the firm. It does not appear that the worker had a significant investment in the firm or a related business, or the risk of incurring a substantial financial loss beyond the normal loss of compensation. The firm did not make benefits available to the worker. The firm's website included a picture of the worker. Neither party incurred a penalty or liability when the work relationship ended.

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## Analysis

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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, the firm's statement that the worker was an independent contractor pursuant to an 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.

Factors that illustrate whether there was a right to control how a worker performed a task include training and instructions. In this case, the firm trained the worker. It retained the right to change the worker's methods and to direct the worker to the extent necessary to protect its financial investment and ensure its customers satisfaction with the work. Training a worker indicates that the person or persons for whom the services are performed want the services performed in a particular method or manner. The firm must have been responsible for resolving any problems that were beyond the worker's capacity to resolve. The worker followed the schedule set by the firm. He performed his services on the firm's customers' premises. Control over the place of work is indicated when the person or persons for whom the services are performed have the right to compel the worker to travel a designated route, to canvass a territory within a certain time, or to work at specific places as required. There is no indication that the worker engaged and paid others to perform services for the firm on his behalf. These facts show that the firm retained behavioral control over the services of the worker.

Factors that illustrate whether there was 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 bid on jobs, 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. "Profit or loss" implies the use of capital by a person in an independent business of his or her own. Any costs due to the firm by the worker were offset by credits from the firm. Lack of significant investment by a person in facilities or equipment used in performing services for another indicates dependence on the employer and, accordingly, the existence of an employer-employee relationship. The firm paid the worker on a commission basis. The opportunity for higher earnings or of gain or loss from a commission arrangement is not considered profit or loss. These facts show that the firm retained control over the financial aspects of the worker's services.

Factors that illustrate how the parties perceived 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 were part of the service recipient's regular business activities. In this case, the worker performed his services on a continuing basis. He performed his services under the firm's name. The worker was not engaged in an independent enterprise, but rather the cleaning services performed by the worker were a necessary and integral part of the firm's professional cleaning business. Integration of the worker's services into the business operations generally shows that the worker is subject to direction and control. When the success or continuation of a business depends to an appreciable degree upon the performance of certain services, the workers who perform those services must necessarily be subject to a certain amount of control by the owner of the business. The worker could have performed de minimis services on his own time; however, however, it is possible for a person to work for a number of people or firms concurrently and be an employee of one or all of them. Although the firm did not provide benefits to the worker, neither party incurred a liability when the work relationship ended, a factor indicating an employer-employee relationship. These facts show that the firm retained control over the work relationship and services of the worker.

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.