

## SS-8 Determination—Determination for Public Inspection

Occupation

03PMW.110 RepairMaintenanceWkr

Determination:

☒ Employee

☐ Contractor

UILC

Third Party Communication:

☒ None

☐ Yes

### Facts of Case

The firm is in the business of residential property management. The worker was engaged by the firm to perform painting and other maintenance services. The firm reported the worker's remuneration on Forms 1099-MISC for 2011 through 2014.

Information from the parties supports that the firm relied upon the worker's prior training and experience to perform his services. The firm provided the worker with his work assignments. If problems or complaints occurred, the worker contacted the resident manager, but the worker was responsible for their resolution. The worker submitted invoices each week detailing the work completed, including dates, location of jobs, and time spent. He performed his services on properties assigned by the firm. The worker was required to perform his services personally.

The firm provided the paint and consumables. The worker provided his tools, brushes, rollers, etc. He incurred transportation expenses for travel between properties. The firm paid the worker at an hourly rate. It did not cover him under workers' compensation. Neither party indicated an investment by the worker in the firm or a related business. Other than the loss, and wear and tear of the worker's personal tools, the worker did not risk incurring a financial loss beyond the normal loss of compensation.

The firm did not make general benefits available to the worker. The firm stated that the worker provided similar services for others during the same time period. There is no evidence presented that the worker advertised his services or maintained a business listing. Both parties reserved the right to terminate the work relationship at any time without incurring a penalty or liability, and in fact, the firm terminated the work relationship.

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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. If a firm has to make a worker "understand" or even if a worker "agreed to" being an independent contractor (as in a verbal or written agreement), this factor does not determine the worker's status as an independent contractor. An individual knows they are in business for themselves offering their services to the public and does not need to be made aware of, understand, or agree to be an independent contractor.

Factors that illustrate whether there was a right to control how a worker performed a task include training and instructions. In this case, while the firm relied upon the worker's prior training and experience to perform his services, it is only reasonable to assume that it retained the right to change the worker's methods and to direct the worker to the extent necessary to protect its financial investment. Although the worker was responsible for resolving any problems or complaints that may have occurred, the firm must have been responsible for resolving any problems that were beyond the worker's capacity to resolve. The worker performed his services on properties assigned by the firm. 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. The worker was required to perform his services personally, meaning he could not engage and pay others to perform services for the firm on his behalf. 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. 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 projects, 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. The worker provided his personal tools and supplies. 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. The firm paid the worker at an hourly rate. Payment by the hour generally points to an employer-employee relationship. 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 was not engaged in an independent enterprise, but rather the painting and maintenance services performed by the worker were a necessary and integral part of the firm's property management 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 business. The worker could have performed his services for other companies; 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, it terminated the work relationship without incurring a liability. The right to discharge a worker is a factor indicating that the worker is an employee and the person possessing the right is an employer. 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.