

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

Occupation 03PMW.142 RepairMaintenanceWkr	Determination: <input checked="" type="checkbox"/> Employee <input type="checkbox"/> Contractor
UILC	Third Party Communication: <input checked="" type="checkbox"/> None <input type="checkbox"/> Yes

**Facts of Case**

The worker submitted a request for a determination of worker status in regard to services performed for the firm from August 2014 to March 2015 as a mobile maintenance foreman. The work done by the worker included building and installing conveyor belt cleaning devices. The firm initially classified the worker as an independent contractor and later reclassified the worker to employee status due to issues of liability and injury. The firm issued the worker Form 1099-MISC for the period in question. The worker filed Form SS-8 as he believes he erroneously received Form 1099-MISC.

The firm's response stated its business is the repair of heavy industrial equipment. The worker was engaged as an outside contracted maintenance worker from September 2014 to February 2015. When initially hired, the worker would determine the way he performed his job and the firm would only require results. The worker also requested to be classified as an independent contractor. As the firm was pleased with his work, the parties mutually agreed to expand the worker's duties. As the worker would be supervised with regard to the manner and means of performing his work due to additional duties, he became an employee. There was no written agreement between the parties.

The firm stated as this was a new job, the worker went into the job site with one of the firm's employees and he was shown the work. The firm's customer gave the worker daily assignments, which were the same daily. The worker initially determined the methods by which assignments were performed. The firm subsequently determined the methods. Personnel at the job site or at the firm were contacted and responsible for problem resolution. The worker was required to prepare maintenance reports for the firm's customer. The worker had no set time. He went in mornings and stayed until the job was finished. Services were performed at the customer's location. The firm did not require the worker to attend meetings; however, the firm's customer may have required him to attend meetings. The firm did not require the worker to personally perform services. If substitutes or helpers were needed, they were hired by temp services. The firm was responsible for paying substitutes or helpers. The worker stated the firm provided and paid for MSHA and OSHA training. The worker job shadowed another individual. The firm provided work assignments and determined the methods used. The firm's owner or operations manager was contacted if problems or complaints arose. The worker was required to prepare a daily job list reporting the work he had performed. The worker's routine consisted of reporting to the firm in the morning and driving the firm's truck to the job site. The worker performed services, logged reports, and then drove the firm's truck back to its office. Services were performed at the firm's premises, 50% of the worker's time, and job sites (50%). The worker was required to attend staff meetings, meetings with the operations manager, and provide daily updates. The firm required the worker to personally perform services. The firm hired and paid substitutes or helpers.

The firm stated it provided a company truck and tools as needed. The worker provided his personal truck. The worker did not lease equipment. The worker did not incur unreimbursed expenses as the firm reimbursed him for gas if he used his personal vehicle. Customers paid the firm. The firm paid the worker an hourly rate of pay; a drawing account for advances was not allowed. The firm did not carry workers' compensation insurance on the worker. The worker stated he did not provide supplies, equipment, or materials. He did not incur economic loss or financial risk. The firm established the level of payment for the services provided.

Benefits were not made available to the worker. The work relationship could be terminated by either party without incurring liability or penalty. The worker did not perform similar services for others or advertise. The firm stated there was no agreement prohibiting competition between the parties. The firm represented the worker as a contractor to its customers. The worker was hired as a full-time employee in February 2015. The worker stated the firm represented him as an employee to its customers. Services were performed under the firm's business name.

The worker provided a copy of the signed MSHA reimbursement agreement. It stated, in part, the firm was willing to pay for the cost of the training education that would improve the value of the worker's services to the firm. However, due to the expense involved, the firm needed a commitment from the worker to insure the education would be applied while working for the firm. In consideration of the firm paying for training education, the worker agreed to continue performing services for the firm for a period of one year following the training. If for any reason the worker voluntarily left the firm or he was terminated for good cause, the worker agreed to repay the amount of training education to the firm. The worker also provided a copy of the signed agreement not to disclose or compete. It stated, in part, for a period of one year following the date of termination, the worker would not, without the firm's prior written consent, take part in activities in competition with the firm.

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

Training a worker by requiring an experienced employee to work with the worker, by corresponding with the worker, by requiring the worker to attend meetings, or by using other methods, indicates that the person or persons for whom the services are performed want the services performed in a particular method or manner. This is true even if the training was only given once at the beginning of the work relationship. In this case, the firm provided the worker on-the-job training. Furthermore, 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 daily transactions, and ultimately 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, 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, probationary, 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.