

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

Occupation

03TEC Technicians

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 February 2015 to September 2017 as a door technician. The work done by the worker included serving customers' needs and interests by installing a variety of doors and hardware, cutting custom fittings, etc. The firm issued the worker Form 1099-MISC for the years in question. The worker filed Form SS-8 as he believes he erroneously received Form 1099-MISC.

The firm's response states its business is refinishing doors and the installation of doors and windows. The worker was engaged as a carpenter. The work done by the worker included installing door frames, hardware, and refinishing doors. The worker was classified as an independent contractor as he was free to set his own schedule based on his availability and he was paid an agreed rate per day for labor. The worker signed Form W-9, Request for Taxpayer Identification Number and Certification.

The firm stated it did not provide specific training or instruction to the worker. Work orders were assigned daily for those available to work. The methods and performance used to complete assignments were mutually agreed upon. If problems or complaints arose, the firm was contacted; the worker was responsible for resolution. The firm required the worker to complete a daily scope of work report. The worker's routine consisted of completing a scope of work assigned for each job, for each day. Services were performed at the firm's premises (30% of the worker's time) and customer locations (70%). Meetings were not required. The worker was not required to personally perform services. Either party could hire a substitute or helper. Which party paid the substitute or helper may have varied. If paid by the worker, the firm did not reimburse the worker. The worker stated the firm provided on-the-job training related to door installation. The firm determined the methods by which assignments were performed and assumed responsibility for problem resolution. In addition to completing work orders, the firm also required he provide customer service receipts. Services were performed Monday through Friday, 8 am to 5 or 6 pm, with occasional Saturdays. The firm required he attend a monthly meeting. The firm was responsible for hiring and paying substitutes or helpers.

The firm stated it provided materials. The worker provided and incurred the unreimbursed expense associated with small hand tools and travel. The worker did not lease equipment, space, or a facility. Customers paid the firm and worker. The firm paid the worker a daily rate of pay. A minimum rate of pay was not guaranteed and a drawing account for advances was not allowed. The firm did not carry workers' compensation insurance on the worker. The worker did not establish the level of payment for the services provided or the products sold. The worker stated the firm also provided all supplies and equipment, in addition to a firm-issued work shirt and business cards advertising its business. He did not incur expenses in the performance of services for the firm. Customers paid the firm. The firm paid him an hourly rate of pay. The firm established the level of payment for the services provided or the products sold.

The firm stated the work relationship could be terminated by either party without liability or penalty. The worker performed similar services for others; the firm's approval was not required for him to do so. There was no agreement prohibiting competition between the parties. It is unknown if the worker advertised. The firm represented the worker as an installer to its customers. The work relationship ended when the job was completed, and the contract ended. The worker stated benefits were not provided. He did not perform similar services for others. There was no written agreement related to competition between the parties; however, there was an understanding between the parties. He did not advertise. The firm represented him as an employee to its customers. Services were performed under the firm's business name. The work relationship ended when he quit.

Both parties agreed the worker was not responsible for soliciting new 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.

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. In this case, the installation 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 jobs completed, 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, 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 or daily 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.