

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

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| Occupation<br>03TEC Technicians | Determination:<br><input checked="" type="checkbox"/> Employee <input type="checkbox"/> Contractor  |
| UILC                            | Third Party Communication:<br><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 submitted a request for a determination of worker status in regard to services performed for the firm from June 2018 to November 2018 as a sprinkler repair technician. The services performed included sprinkler repairs. The firm bid on jobs, provided on-the-job training, and paid the worker an hourly rate of pay. The firm issued the worker Form 1099-MISC for 2018. The worker filed Form SS-8 as he believes he erroneously received Form 1099-MISC.

The firm's response states it hires independent contractors to work during the summer months to fix sprinklers. The firm would schedule the worker based on his availability. The worker met with the customer, addressed the concerns, and collected payment for the work performed. The worker was classified as an independent contractor as he set his own hours, provided his own tools, met with customers, and collected payment. The worker was paid for hours worked on each job. Before being hired, the worker was aware he was working as an independent contractor. Services were performed under a signed independent contractor waiver of workers' compensation coverage agreement.

The firm stated it instructed the worker to take care of customers' sprinkler problems as scheduled. The worker received work assignments via a scheduling application on his phone. The worker determined the methods by which assignments were performed. If problems or complaints arose, the firm's owner was contacted. The worker was responsible for resolution. The worker's routine consisted of arriving at the scheduled appointment based on his availability, completing the work, and collecting the money. Services were performed at customer locations and the worker's home. Meetings were not required. The firm required the worker to personally perform services. If helpers were needed, the firm sent more contractors. Customers paid the firm and the firm paid the workers their cut. The worker stated the firm provided him on-site instruction on how to repair sprinklers as he had no prior experience in this line of work. The firm determined the methods by which assignments were performed and assumed responsibility for problem resolution. Receipts were submitted for reimbursement of gas and supplies. His daily routine consisted of meeting daily at a designated location and driving to the work site to repair sprinklers. When that project was completed, he would drive to the next job site.

The firm stated it provided a vehicle. The worker provided tools, a phone, and a place of business. Customers paid for supplies. The worker did not lease equipment, space, or a facility. Customers paid the firm. The firm paid the worker for billed hours only; a drawing account for advances was not allowed. The firm did not carry workers' compensation insurance on the worker. The worker did not incur economic loss or financial risk. The worker established the level of payment for the services provided. The worker stated the firm reimbursed him for sprinkler parts and gas. The firm established the level of payment for the services provided.

The firm stated the work relationship could be terminated by either party without incurring liability or penalty. It is unknown if the worker performed similar services for others or advertised. There was no agreement prohibiting competition between the parties. The firm represented the worker as a representative/contractor to its customers. Services were performed under the firm's d/b/a business name. The work relationship ended when the worker left. The worker stated he did not perform similar services for others. The firm represented him as a staff member to its customers.

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

The signed agreement states, in part, the worker was not the firm's employee for workers' compensation benefits, and therefore, not entitled to benefits under the firm's policy.

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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 written and 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, collected payment for services performed, 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. As acknowledged by the firm, the worker did not incur economic loss or financial risk. 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.