

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

Occupation 03TEC Technicians	Determination: <input checked="" type="checkbox"/> Employee <input type="checkbox"/> Contractor
UILC	Third Party Communication: <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 January 2016 to February 2018 as a carpet cleaning technician. The firm issued the worker Form 1099-MISC for 2016, 2017, and 2018. The worker filed Form SS-8 as they believe they received Form 1099-MISC in error. There was no written agreement between the parties. The worker believes they were an employee of the firm because the employer made the worker's schedule and order of job duties and supplied a uniform, company vehicle, and all supplies for the jobs.

The firm's response states it is a carpet and upholstery cleaning company. The work provided by the worker was carpet cleaning and salesperson. The worker was requested to clean carpets or upholstery from jobs chosen by the worker from a list provided by the firm. The firm did not provide supervision or direction. A determination of the job class previously set by the state's unemployment compensation board ten years prior was provided for our consideration.

The firm states that the worker received no instruction or training for their job responsibilities. The firm states that the worker was able to choose from a list of jobs on a daily basis and could work as much as they wanted to in order to earn what they wished to do so. The firm states that on days where no work was offered, the worker performed services elsewhere. The firm states that the worker generated their own leads for potential carpet cleaning jobs. The firm states that each job was unique, so the worker had to determine on a job by job basis how to perform their job duties. The firm states that if problems were encountered during the worker's job duties, the worker would initially try to resolve the issue with the client. Any issues that went unresolved were the responsibility of the firm's to address. The firm states that every day was different for the worker, depending upon the amount of jobs available and how often the worker wanted to work. The firm states that the worker would perform all services at the customer's locations. The worker did not have to perform any services personally and did not have to attend any meetings. If substitutes were required, the worker was required to pay for them, and if helpers were required, the firm paid for and hired them. The worker states that they received on the job training with another of the firm's workers. The owner of the firm would provide a list of jobs and locations each morning for workers to choose from, and the owner determined the methods by which job assignments were performed. The worker was required to contact the owner of the firm by cell phone if there were any issues while performing their job duties. The worker was required to report to the shop at 8a.m. and leave with paperwork of daily jobs by 9a.m. with the company vehicle. The worker would then arrive at the job locations by the scheduled time, perform services, then return the company vehicle to the shop's garage after job duties were done. The worker would have to turn in paperwork upon job completion. The worker would spend approximately 30 minutes to 2 hours at each location. The worker was required to perform all services personally. If helpers or substitutes were required, the worker could refer people to the firm but the firm was responsible for hiring and paying any helpers.

The firm states that they provided the worker with cleaning supplies and equipment and the worker had to provide hand tools. The worker did not have to lease space, facilities, or equipment for their job. The firm states that the worker would pay for their own cell phone and insurance. The worker was paid on a piece work and commission basis and did not have access to a drawing account for advances. The customers would pay the firm for all services rendered. The firm did not carry worker's compensation insurance on the worker. The firm states that the worker would have to pay for any damaged equipment that belonged to the firm. The firm states that there was a basic price set for all standard jobs and larger jobs could be negotiated regarding pricing. The worker states that the firm provided all cleaning supplies, equipment, company vehicle, uniform, and travel expenses for the job and the worker did not have to provide anything. The worker would sometimes have unexpected gas expenses or car wash expenses during their job duties. The worker states that they were paid a daily rate and on a piece work basis. The worker states that the firm established the level of payment for all services rendered. The firm's website shows what fees were charged by the firm for all services rendered, demonstrating this fact.

The firm states that they did not offer the worker any benefits. The work relationship could be terminated by either party without loss or liability. The worker did not perform any similar services for any other firm during the work relationship. There were no non-compete agreements in place between worker and firm. The worker was not a member of a union. The worker was represented by the firm as a contractor under the firm's name. The work relationship ended when the worker ceased offering services after customer complaints. The worker states that they did not advertise their services to the public nor did they perform similar services for any other firm. The worker states that they were represented to clients of the firm as an employee of the firm. The work relationship ended when the worker was terminated by 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, 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.

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 of carpet cleaning. The firm provided work assignments by virtue of the customers served, required the worker to report on services performed at the end of their job duties, and 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. The firm provided all supplies, materials, uniform, and company vehicle for the worker's job duties. Based on the 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. The firm represented the worker under the firm's name and provided a uniform for the worker to wear while performing their job duties. 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.