

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

Occupation

03TRA Carpenter

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 firm is in the business of providing construction services. The worker was engaged as a framer. He received a 2017 Form W-2 and a 2017 Form 1099-MISC for his services. There was no written agreement.

Both the firm and the worker agreed that the firm did not provide any training and initially engaged the worker as an employee as evidenced by issuing a Form W-2 and withholding employment taxes. The firm would designate a job site and tasks to perform, including the scope of work. Each party indicated that the other determined the methods by which the assignments were performed. Both parties agreed that the firm would be contacted if any issues or problems arose. There were no required reports. The firm noted that the worker's routine was to work from about 8-9am and quit between 4-6pm. He worked at the firm's customers' locations as directed by the firm. There were no meetings. Each indicated that the other would hire and pay any substitute workers.

The firm provided the power tools, safety equipment, heavy machinery and building materials. The worker provided hand tools and a tool bag. The worker was paid an hourly rate and had no other economic risk. The firm added that he was also paid piece work. Both agreed that the customer paid the firm. The firm carried workers' comp. insurance on the worker; the firm disagreed. The firm established the level of payment for services; the firm indicated that the payment was agreed upon by both parties.

Both the firm and the worker agreed that there were no benefits and that either party could terminate the relationship without incurring a liability. The worker did not perform similar services for others; the firm disagreed. The firm noted that the worker advertised through an internet site. According to the firm, the worker approached them for their assistance in starting his own business. This supports the fact that the worker was not self-employed. The firm provided documentation supporting their claim that the worker was operating an independent venture; however, the information involved the 2018 year. The worker's invoices, supplied by the firm, were based on an hourly rate, and generated through an app supplied by the firm. No bids on the work were provided. Both parties had indicated that the work relationship ended in 2017. .

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## Analysis

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In determining whether an individual is an employee or an independent contractor under the common law, all evidence of both control and lack of control or independence must be considered. The relationship of the worker and the business must be examined. Facts that show a right to direct or control how the worker performs the specific tasks for which he or she is hired, who controls the financial aspects of the worker's activities, and how the parties perceive their relationship should be considered. As is the case in almost all worker classification cases, some facts point to an employment relationship while other facts indicate independent contractor status. The determination of the worker's status, then, rests on the weight given to the factors, keeping in mind that no one factor rules. The degree of importance of each factor varies depending on the occupation and the circumstances.

Factors that illustrate whether there is a right to control how a worker performs a task include training and instructions. In this case, the firm retained the right to change the worker's methods and to direct the worker to the extent necessary to protect its financial investment. The firm obtained the jobs, and remained obligated to its customers. The worker was engaged as an experienced framer. He was told where to go, when to go, and what to do. A worker who is required to comply with another person's instructions about when, where, and how he or she is to work is ordinarily an employee. This control factor is present if the person or persons for whom the services are performed have the right to require compliance with instructions. Some employees may work without receiving instructions because they are highly proficient and conscientious workers or because the duties are so simple or familiar to them. Furthermore, the instructions, that show how to reach the desired results, may have been oral and given only once at the beginning of the relationship. While the worker's schedule may have been flexible due to each job, if the nature of the occupation makes fixed hours impractical, a requirement that workers be on the job at certain times is an element of control. The worker provided his services continuously, and not just on a one time basis. A continuing relationship between the worker and the person or persons for whom the services are performed indicates that an employer-employee relationship exists. A continuing relationship may exist where work is performed in frequently recurring although irregular intervals.

Factors that illustrate whether there is 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 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. The firm had the investment in the business operation, equipment, tools, and supplies. While it is acknowledged that the worker provided some tools of his trade, those would not be considered a significant investment. The worker received an hourly rate of pay and had no other economic risk. 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. Although the firm indicated that the worker was paid by the piece/job, it did not provide any job bids submitted by the worker. The worker submitted invoices to the firm as instructed in order to be paid; the invoices were based on the worker's hourly rate.

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. There were no benefits and there was no written agreement. The worker was engaged as a framer/carpenter for the firm's construction operation. When doing so, the worker was not engaged in a separate business venture. 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 *Bartels v. Birmingham*, 332 U.S. 126, 1947-2 C. B.174, the Supreme Court stated that whether there is an employment relationship is a question of fact and not subject to negotiation between the parties. Whether or not the worker was intending to start a business was not relevant to the work relationship as he was hired and treated as an employee. He had no business presence. Neither his services nor the circumstances of the work relationship changed.

Based on the above analysis, we conclude that the firm had the right to exercise direction and control over the worker for the entire work relationship to the degree necessary to establish that the worker was a common law employee and not an independent contractor operating a trade or business.

Please see Publication 4341 for guidance and instructions for firm compliance.