

## SS-8 Determination—Determination for Public Inspection

Occupation

03TRA Tradespersons

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 in the business of general construction and pool repair/maintenance. As the owner of the firm, you engaged the worker to provide services as a laborer. You reported the worker's remuneration on Form 1099-MISC for 2017. You stated that there was a verbal agreement between the parties on a per project basis.

Information from the parties supports that you relied upon the worker's prior experience and training to perform his services. You contacted the worker to work on projects for a limited duration, and he agreed to general work assignments before reaching the work site. Specific tasks were assigned by the site manager on-site. The site manager determined the methods by which the worker performed his services. If problems or complaints occurred, the worker contacted the site manager for resolution. The worker's daily routine varied depending on the project. The parties agreed to the worker's work schedule prior to assignment to specific projects. The worker performed his services on-site at the job location. He was required to perform his services personally.

You provided the materials and any specialty equipment. The worker provided his own small tools and safety equipment. You paid the worker at the agreed to hourly rate. You did not cover him under workers' compensation. Customers paid your firm directly at prices that you established. Neither party indicated an investment by the worker in your firm or a related business. The worker risked the loss or damage to his equipment. He incurred commuting expenses.

The worker obtained his job through an application process. You did not make benefits available to him. Both parties reserved the right to terminate the work relationship without incurring a penalty or liability. You did not prohibit the worker from providing similar services for others during the same time period. There is no evidence submitted showing the worker advertised his services or maintained a business listing.

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## Analysis

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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, your statement that the worker was an independent contractor pursuant to an 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. If a firm has to make a worker “understand” or even if a worker “agreed to” being an independent contractor (as in a verbal or written agreement), this factor does not determine the worker’s status as an independent contractor. An individual knows they are in business for themselves offering their services to the public and does not need to be made aware of, understand, or agree to be an independent contractor.

Factors that illustrate whether there was a right to control how a worker performed a task include training and instructions. In this case, the worker worked under your on-site manager, showing you retained the right to change the worker’s methods and to direct the worker to the extent necessary to protect your financial investment. The worker followed the schedule that you set and performed his services at your customers’ locations. 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. The worker was required to perform his services personally, meaning that he could not engage and pay others to perform services for your firm on his behalf. 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. These facts show that you retained behavioral control over the services of the worker.

Factors that illustrate whether there was 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. “Profit or loss” implies the use of capital by a person in an independent business of his or her own. Lack of significant investment by a person in facilities or equipment used in performing services for another indicates dependence on the employer and, accordingly, the existence of an employer-employee relationship. The worker provided his personal tools and safety equipment; however, 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. You paid the worker at an hourly rate. Payment by the hour generally points to an employer-employee relationship. These facts show that you retained control over the financial aspects of the worker’s services.

Factors that illustrate how the parties perceived 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 were part of the service recipient’s regular business activities. In this case, the worker performed his services on a continuing 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. The worker was not engaged in an independent enterprise, but rather the services performed by the worker as a laborer were a necessary and integral part of your general construction and pool repair/maintenance business. 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. The worker could have performed similar services for others during the same time period; however, it is possible for a person to work for a number of people or firms concurrently and be an employee of one or all of them. Although you did not make benefits available to the worker, both parties retained the right to terminate the work relationship without incurring liability or penalty, a factor indicating an employer-employee relationship. These facts show that you retained control over the work relationship and services of the worker.

Based on the above analysis, we conclude that you 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.