

**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**

It is our usual practice in cases of this type to solicit information from both parties involved. After the worker's initial filing of the Form SS-8, Determination of Worker Status for Purposes of Federal Employment Taxes and Income Tax Withholding, we requested information from the firm concerning this work relationship. The firm provided information in regard to this work relationship by completing Form SS-8.

From the information provided the firm is a construction company and the worker was engaged from January 2018 to April 2018 to scope out the firm's project, do a list of materials, get pricing from various suppliers, prepare submittals and submit the submittals, RFIs etc. directly to the project owner and various suppliers. The firm believes the worker was an independent contractor while performing services for them because he worked independently without supervision from his home office and setting his own hours. There was no written agreement between the firm and the worker. The firm reported the worker's earnings on a Form 1099-MISC.

The firm states that in early 2018, the worker contacted them seeking employment and in January 2018, the worker went to their office to meet with them. The firm states the worker was unwilling to come to their office to work on a full-time basis. The firm states that it was explained clearly to the worker that if he was to be an employee, he would have to have fixed hours and that the work would have to be done at their office where they could supervise his services. The firm states that if the worker wanted to work from home and essentially without supervision, they wanted the worker to be paid on a lump sum basis and they would issue a 1099 to the worker at the end of the tax year. The firm states that as the worker was not familiar with the project, it was difficult for him to do this but the worker stated he would track his own hours and provide the firm with his hours each week. The firm had knowledge of the worker and his services on a prior project when he was employed by a material supplier of theirs. Because of the firm's previous interaction with the worker, the firm states they felt comfortable giving him a copy of plans and specifications on one of their projects.

The firm states that no payroll taxes were ever taken from the worker's pay and they state that at no time did the worker request that payroll deductions be taken from his earnings. The firm states they did not fire the worker or let him go for lack of work. The firm states the worker voluntarily terminated the work relationship.

The firm states they provided no training or instructions to the worker and the worker determined how he completed his assignments. The firm states the worker set his own schedule and performed his services in his home. The firm states the worker was not required to attend meetings. The hiring and paying of substitutes or helpers did arise in this case.

The firm states they provided the original copy of plans and specs plus quotations from bid time to the worker in order to perform his services. The worker provided a telephone and computer but did not incur any other expenses. The firm states the worker was compensated on the honor system as the worker tracked his own hours. The firm states the worker established the level of payment for the services provided. The worker could not incur a loss as a result of his services.

The worker was not eligible for employee benefits. The worker did not perform similar services for others and he did not advertise his services. The worker was represented as a representative of the firm's company performing his services under the firm's business name. Either party could terminate the work relationship at any time without incurring a liability.

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## Analysis

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It can be very frustrating to both the firm and the worker when a work relationship begins and both appear to be on the same page as to the work to be done and the status of the worker. What may appear to be a general overview given to a worker of what services are to be performed and how they like it done without specific instructions given, in the progression of the work relationship, additional questions are asked – answers are given, and each party begins to perceive the relationship differently. Our job then is to look at the facts of the work relationship and differentiate what services were performed, what was the intent of the relationship between the parties, did the worker have autonomy from the firm, was he/she operating his/her own business, and how much control, if any, did the firm have over a worker.

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.

Evidence of control generally falls into three categories: behavioral control, financial control, and relationship of the parties, which are collectively referred to as the categories of evidence. In weighing the evidence, careful consideration has been given to the factors outlined below.

Factors that illustrate whether there is a right to control how a worker performs a task include training and instructions. In this case, the worker was experienced in this line of work and did not require training or detailed instructions from the firm. The need to direct and control a worker and his services should not be confused with the right to direct and control. The worker provided his services on behalf of the firm rather than an entity of his own. The firm was responsible for the quality of the work performed by the worker and for the satisfaction of their clients. This gave the payer the right to direct and control the worker and his services in order to protect their financial investment, their business reputation, and their relationship with their clients.

The firm afforded the worker with a great deal of freedom while performing his services as the majority of his services were performed away from the firm's premises. With more and more workers working out of their home office and this becoming the reoccurring trend in the current workplace, this fact by itself, does not mean that the worker is not an employee.

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.

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. Both parties retained the right to terminate the work relationship at any time without incurring a liability.

Subcontractors are truly independent of a firm and a firm's business. Some of the characteristics of subcontractors are that they will not consider a firm as their boss, they will have a contract for each job, they will carry their own insurance, they will pay their own helpers and labor costs, they will not have to personally perform their services but have the ability to have anyone they engage perform services since that person would be representing the subcontractors business, and they would have their own business bank account and credit lines. Subcontractors will file tax returns and conduct themselves as real businesses. Subcontractors will dictate what services their business offers and how they process and perform those services, what software it would use, and how much it would charge for those services. A firm does not dictate how a worker will operate his or her own business, what services that business will offer, and what his or her responsibilities are. We did not find that the worker had this freedom or autonomy. There was no evidence presented and through our thorough research from various sources available to us, found no evidence that the worker operated a business, advertised his services to the public, had obtained a business license or had a business registration in the state which he performed services. The worker did not have an opportunity to incur a loss as a result of his services as someone in business can.

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.