

**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 worker submitted a request for a determination of worker status in regard to services performed for the payer from November 2017 to August 2018 as a farm worker. A copy of the 2017 tax reporting document was not provided for our review. The payer issued the worker Form 1099-MISC for 2018. The worker filed Form SS-8 as he believes he erroneously received Form 1099-MISC.

The payer's response states it is a farming business. The worker was engaged to milk cows and perform other farm activities. The worker was classified as an independent contractor as he determined when he was helping on the farm.

The payer stated the worker determined which assignments he would perform and the methods by which assignments were performed. The payer was contacted if problems or complaints arose. The payer was responsible for resolution. Reports and meetings were not required. The worker did not have a daily routine, he would show up when available. Services were performed at the payer's premises. The payer required the worker to personally perform services. The worker stated the payer provided specific instruction on running equipment, milking cows, etc. The payer provided work assignments and determined the methods by which assignments were performed. The payer required he report on equipment issues and sick livestock. The payer set the work schedule. The payer was responsible for hiring and paying substitutes or helpers.

The payer stated the worker did not lease equipment, space, or a facility. The payer paid the worker commission when he worked. The payer did not carry workers' compensation insurance on the worker. The worker established the level of payment for the services provided. The worker stated the payer provided all supplies, equipment, and materials. The payer paid him an hourly rate of pay. He did not incur economic loss or financial risk. The payer established the level of payment for the services provided.

The payer stated the work relationship could be terminated by either party without incurring liability or penalty. The worker performed similar services for others. The payer represented the worker as a contractor. The work relationship ended when the worker quit. The worker stated the benefit of personal days was made available to him. He did not advertise. The payer represented him as an employee to its customers. He was terminated by the payer.

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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 payer required the worker to personally perform services. Furthermore, the labor services performed by the worker were integral to the payer's farming operation. These facts evidence the payer retained the right to direct and control the worker to the extent necessary to ensure satisfactory job performance in a manner acceptable to the payer. Based on the worker's past work experience and work ethic the payer may not have needed to frequently exercise its right to direct and control the worker; however, the facts evidence the payer retained the right to do so if needed.

A person who can realize a profit or suffer a loss as a result of his or her services is generally an independent contractor, while the person who cannot is an employee. "Profit or loss" implies the use of capital by a person in an independent business of his or her own. The risk that a worker will not receive payment for his or her services, however, is common to both independent contractors and employees and, thus, does not constitute a sufficient economic risk to support treatment as an independent contractor. If a worker loses payment from the payer's customer for poor work, the payer shares the risk of such loss. Control of the payer over the worker would be necessary in order to reduce the risk of financial loss to the payer. The opportunity for higher earnings or of gain or loss from a commission arrangement is not considered profit or loss. 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. Based on the commission or 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 payer's business. 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 payer 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 payer can obtain additional information related to worker classification online at [www.irs.gov](http://www.irs.gov); Publication 4341.