

**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 firm from December 2014 to August 2018 as a foreman. The work done by the worker included overseeing jobs assigned by the firm. The firm provided specific instruction for how the work would be done and work tools. The firm issued the worker Form 1099-MISC for the years in question. The worker filed Form SS-8 as he believes he erroneously received Form 1099-MISC.

The firm's response states it supplies general contractor services for residential remodeling and new construction. The worker was engaged as a subcontractor who provided finish carpentry services. The firm resold those services and markup to the firm's customers as is customary for general contractors. There was no written agreement between the parties and the worker was never offered employment. The worker was retained on multiple occasions during the years in question. The verbal agreement provided for the payment of specified services as the work was accepted. The worker signed Form W-9 and the firm issued him Form 1099-MISC. The firm did not direct the worker as an employee.

The firm stated it provides no training. It only retains subcontractors who can perform the specified work with no assistance or instruction. Typically, the worker was given the objective and schedule. Meetings were held, as needed, to keep the project on track. The worker typically determined the methods by which assignments were performed unless the firm's customers supplied specifics. As the general contractor, the firm works with its subcontractors to resolve service and other issues. Satisfactory conclusions are arrived at mutually. Reports were not required. The worker was responsible for adhering to deadlines agreed upon at the beginning of the assignment. Except to coordinate with other contractors, the firm does not generally become involved in the specific daily scheduling of workers. Services were performed at customer locations. The firm did not require the worker to personally perform services. The worker was responsible for hiring and paying substitutes or helpers. The worker stated the firm provided specific instruction at the beginning of each job of what and how each job was to be done. The firm's project manager's daily check list and project foreman list were provided for our review. Work assignments were given during group team meetings and phone conversations, in addition to being documented on lists. The firm determined the methods by which assignments were performed and assumed responsibility for problem resolution. Reports included daily progress reports to document the progress of the job and how other workers were doing on the job. Per the firm's written requirements, he was required to arrive 15-30 minutes prior to other workers. Tools were picked up at the firm's premises. The firm required he attend its weekly mandatory meeting. A copy of a meeting agenda was provided for our review. The firm required he personally perform services. Only the firm was authorized to hire substitutes or helpers. The firm was responsible for paying them.

The firm stated supplies and materials provided to the worker were paid for by customers. The worker supplied his own equipment and any supplies not provided by the customer. The worker did not lease equipment, space, or a facility. Expenses incurred on behalf of customers were reimbursed by the firm to the worker. It is unknown if the worker incurred other expenses. If incurred, they were not reimbursed by the firm. Customers paid the firm. The firm paid the worker based on a weekly invoice; a drawing account for advances was not allowed. An invoice, provided for our review, documents the worker invoiced the firm for labor. The firm did not carry workers' compensation insurance on the worker. The worker's economic loss or financial risk related to possible repair if his work was found substandard or unacceptable. Ultimately the firm would not pay for defective or unacceptable work. The firm could also hold the worker responsible for spoiled materials paid for by customers. The worker did not establish the level of payment for the services provided. As general contractor, the firm adds a customary fixed percentage to the amounts invoiced by workers. The worker stated the firm provided saws, hand tools, scaffolding, ladders, jack-hammer, and other various construction tools. He provided a tool belt and some small tools. The firm reimbursed him a portion of transportation expense for long-distant jobs. The firm paid him an hourly rate of pay.

The firm stated benefits were not made available to the worker. The work relationship could be terminated by either party without incurring liability or penalty. The worker performed similar services for others. The firm's approval was not required for him to do so. There was no agreement prohibiting competition between the parties. The firm was not aware of the worker advertising, if any. As the worker performed services for the firm, he was not typically represented to the firm's customers. If introduced to a customer, he was described as a subcontractor. The worker is still eligible to provide services to the firm. He last performed services in 2018. The worker stated the benefit of bonuses was made available to him. He did not perform similar services for others or advertise. Working side jobs with the firm's clients was not permitted. It was considered a conflict of interest. As workers wear a company shirt on the job site, the firm represents them as employees to its customers. All services were performed under the firm's business name. The work relationship ended when the worker quit as he recognized he would always be paid as an independent contractor 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 firm's 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.

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 this case, the services performed by the worker were integral to the firm's business operation. The firm provided work assignments by virtue of its customers' needs and it ultimately determined the methods by which assignments were performed 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.

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 firm's customer for poor work, the firm shares the risk of such loss. Control of the firm over the worker would be necessary in order to reduce the risk of financial loss to the firm. 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 invoiced 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 firm's business. 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.