

SS-8 Determination—Determination for Public Inspection

Occupation 04FSC Foremen/Superintendents/Crew or Peer Leaders	Determination: <input checked="" type="checkbox"/> Employee <input type="checkbox"/> Contractor
UILC	Third Party Communication: <input checked="" type="checkbox"/> None <input type="checkbox"/> 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 landscape construction and maintenance. The worker was engaged by the firm to perform services as a foreman overseeing irrigation and drainage work for the firm's customer. The firm did not withhold taxes from the worker's remuneration in 2014 through 2016.

Information from the parties supports that the firm relied upon the worker's prior training and experience to perform his services. The worker created his own work assignments based on the needs of the client. The worker determined his work methods and would typically handle complaints himself or contact the client for resolution. He scheduled his own hours and set his own routine. The firm stated that the worker was not required to perform his services personally; helpers were engaged by the worker, without the firm's approval.

The firm provided the majority of the materials. The worker provided some materials, and all of the equipment. The worker billed the firm weekly by submitting detailed invoices listing his hours, his helpers' hours and the rate of pay for each, fuel costs, and the cost of materials; receipts were turned over to the firm. The firm issued payment to the worker for materials, fuel, and the total due to the helpers; the worker distributed payment to each helper. Customers paid the firm directly at the level of payment established by the firm. The worker's economic loss/financial risks related to the loss of equipment, loss of material, and loss for any damages caused. The firm did not carry workers' compensation insurance on the worker.

The firm did not make benefits available to the worker. The firm did not prohibit the worker from performing similar services for others. The firm stated that the worker took over his father's business (the firm used to work for the company); the worker stated he was working for another company prior to the time in question. There is no evidence submitted showing the worker advertised his services or maintained a business listing. The work relationship could have been terminated by either party at any time without incurring liabilities. The worker submitted copies of bids from a plumbing company showing the worker's name along with the firm's name.

Analysis

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, the firm's 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.

Factors that illustrate whether there was a right to control how a worker performed a task include training and instructions. In this case, the firm relied upon the worker's prior training and experience to perform his services. 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. The firm was ultimately responsible for resolving any problems or complaints that may have occurred, showing 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 worker was required to submit weekly invoices, which included services performed, and the number of hours worked by the worker and helpers. A requirement that the worker submit regular or written reports to the person or persons for whom the services are performed indicates a degree of control. The firm stated that the worker was not required to perform his services personally; however, there is no indication that the worker could engage and pay others to perform services as a foreman for the 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 the firm 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 submit bids, 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 was responsible for paying the worker, and each helper, at an hourly rate. Payment by the hour generally points to an employer-employee relationship. The firm reimbursed the worker for fuel, and materials purchased by the worker. Payments were made on a weekly basis. In such instances, the firm assumes the hazard that the services of the worker will be proportionate to the regular payments. These facts show that the firm 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 was not engaged in an independent enterprise, but rather the services performed by the worker as a foreman were a necessary and integral part of the firm business of providing landscape construction, maintenance, and related services. 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 bids for jobs show the worker's name and the firm's name, showing the worker performed services on behalf of the firm. Both parties retained the right to terminate the work relationship at any time without incurring liability or penalty, a factor indicating an employer-employee relationship. These facts show that the firm retained control over the work relationship and services of the worker.

If the person or persons for whom the services are performed hire, supervise, and pay assistants, that factor generally shows control over the workers on the job. However, if one worker hires, supervises and pays the other assistants pursuant to a contract under which the worker agrees to provide materials and labor and under which the worker is responsible only for the attainment of a result, this factor indicates an independent contractor status. However, it is also possible that the individual may be an employee acting in the capacity of a foreman for, or a representative of, the employer.

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 for all services, and not an independent contractor operating a trade or business.