

**SS-8 Determination—Determination for Public Inspection**

Occupation

04PSC Foreman

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 September 2017 to January 2019 as a foreman. The work done by the worker included the daily supervision and directing of laborers to ensure the work was done to specifications. The firm issued the worker Form 1099-MISC for 2017 and 2018. The worker filed Form SS-8 as he believes he erroneously received Form 1099-MISC.

The firm's response states it is a construction company that installs fences and decks. The firm enters a bid for contract with its clients. The worker did not have a job title. He was engaged to help with the installation of fences and decks according to the layout of the project. In addition, as the most experienced person engaged by the firm, he helped direct the work flow by directing other workers. The worker was classified as an independent contractor, in part, as requested by the worker. The worker was free to complete assignments at his own pace as long as he followed the layout of the project and it was completed within the client's time frame. The worker used a combination of his own personal tools and those provided by the firm. He set his rate of pay and was not trained nor received benefits from the firm. There was no written agreement between the parties.

The firm stated it is not responsible for training workers. Workers are given a layout of the specific project and client expectations. Work assignments were given to the worker on-site. The worker determined the methods by which assignments were performed based on his experience. If problems or complaints arose, the firm was contacted and assumed responsibility for resolution. The firm required the worker to provide verbal progress reports and notification of project completion. Meetings were not required. The worker did not have set hours. He went to the work site to obtain the layout. He then completed the work at his own pace based on the client's time frame. Services were performed at site locations. The firm did not require the worker to personally perform services. The worker never hired anyone to help. Had he done so, he would have been responsible for their pay. The worker stated the firm provided specific instruction related to where to perform the job, how to perform it, and time line for completion. The firm determined the methods by which assignments were performed. His routine consisted of reporting to the firm's main location by 8:30 am, loading the work truck, and going to the job site. He would return between 5 – 7 pm. The firm required him to personally perform services. The firm was responsible for hiring and paying substitutes or helpers.

The firm stated it provided materials and some tools. The worker also provided tools. The worker did not lease equipment, space, or a facility. The worker incurred the expense of fuel. The firm would generally not reimburse the worker for his expenses; however, it did sometimes pay the worker's fuel and allowed the worker to borrow a vehicle for personal use. Clients paid the firm. The firm paid the worker a fixed weekly rate of pay, apportioned based on the number of days worked. The worker was allowed a weekly drawing account. If the firm was unable to take on a project, it referred it to the worker. The worker would complete the work independent from the firm and receive customer pay for services performed. The firm did not carry workers' compensation insurance on the worker. The worker did not generally incur economic loss or financial risk. He could have in connection with required tools that he purchased. The worker established the level of payment for the services provided. The worker stated the firm provided all building materials, all tools, and a work truck. He provided and incurred the expense associated with fuel. The firm paid him salary; a drawing account for advances was not allowed. He did not establish the level of payment for the services provided.

The firm stated 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 to do so. There was no agreement prohibiting competition between the parties. The worker did not advertise. The work relationship ended when the worker stopped communication with the firm. The worker stated did not perform similar services for others. Services were performed under the firm's business name. The work relationship ended when he quit.

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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, the firm's statement that the worker was an independent contractor pursuant to a 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 the clients served, required the worker to provide status reports, 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. As acknowledged by the firm, the worker did not incur economic loss or financial risk. Based on the fixed weekly rate of pay arrangement, apportioned based on the days worked, 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.