

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

Occupation

04MAN Manager/Supervisors

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 is seeking a determination of worker classification for services performed as a property manager and maintenance person for the firm from February 2019 until July 2019. The worker received a 1099-MISC from the firm for 2019. The worker feels that they were misclassified because they feel they are a common law employee of the firm. There were no written agreements between the parties.

The firm states that it provides apartment rentals and leasing. The worker was requested to provide property maintenance and management. The firm feels that the worker was classified as an independent contractor because the firm exercised minimal control over the worker's job duties.

The firm states that there was no training provided to the worker. The worker received job assignments through email and phone calls. The firm's property management operations department determined the methods by which jobs were performed. If the worker encountered and problems or complaints, they were required to contact the firm's property management operations department for problem resolution. The worker was required to notify the firm when they completed tasks. The worker performed services for 8 hours daily at the firm's apartment complex. There were no meetings required of the worker. The worker was not required to personally perform services. The firm states that the worker or the firm would hire any helpers needed, and approval was needed by the firm's property management operations department before hiring occurred. The firm and worker would pay any helpers needed, and the worker was reimbursed if they paid for additional helpers. The worker states that the firm did not provide the worker with any training. The job assignments were predetermined at the beginning of each job. The firm's manager was responsible for problem resolution, and the worker provided the firm with late rent reports, vacancy reports, and deposit reports. The worker would arrive at 8am and work until 5pm, providing maintenance and property management services. All job duties were performed at the firm's apartment complex premises. The worker states that they were required to perform services personally. Helpers and substitutes were hired and paid by the firm.

The firm states that they provided maintenance and janitorial supplies to the worker, and the worker provided tools and equipment. The worker did not lease any space, facilities, or equipment for their job duties. The worker incurred maintenance and janitorial supplies expenses that were reimbursed by the firm. The firm states that they paid the worker a lump sum payment with no access to a drawing account for advances. Customers paid the firm, and the firm did not carry worker's compensation insurance on the worker. The firm states that the worker faced no economic loss or financial risk during the performance of their job duties. The firm states that the worker established the level of payment for services provided. The worker states that the firm provided all supplies, equipment, and materials for their job duties. The worker states that the firm reimburse the worker for any job-related expenses incurred. The worker was paid a salary by the firm. The worker states that the firm established the level of payment for services provided.

The firm states that there were no benefits offered to the worker. The work relationship could be terminated by either party without liability or penalty. The firm states that the worker did not perform similar services for other firms and there were no non-compete agreements in place between the parties. The worker was not a member of a union and did not advertise their services to the public. The firm represented the worker as performing property management and maintenance. The work relationship ended when a notice was issued. The worker states that they did not perform similar services for other firms during the work relationship. The worker did not advertise their services to the public. The worker states that the firm represented the worker as an employee of the firm. The worker quit and ended the work relationship.

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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 firm required the worker to personally perform services. Furthermore, the services performed by the worker were integral to the firm's business operation as an apartment complex. The firm provided work assignments by virtue of the customers served, required the worker to report on services 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.

Payment by the hour, day, week, or month generally points to an employer-employee relationship, provided that this method of payment is not just a convenient way of paying a lump sum agreed upon as the cost of a job. In such instances, the firm assumes the hazard that the services of the worker will be proportionate to the regular payments. This action warrants the assumption that, to protect its investment, the firm has the right to direct and control the performance of the workers. Also, workers are assumed to be employees if they are guaranteed a minimum salary or are given a drawing account of a specified amount that need not be repaid when it exceeds earnings. In this case, the worker did not invest capital or assume business risks. The firm provided all equipment, materials, and supplies needed for the job duties and reimbursed the worker for all job-related expenses. 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 salary 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.