

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

Occupation

04OPC Other Persons in Charge

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 February 2019 to November 2019 as Vice President and compliance officer. The firm issued the worker Form 1099-MISC for 2019. The worker filed Form SS-8 as they believe they received Form 1099-MISC in error. The worker provided extensive copies of text and email exchanges between the parties, a letter from the firm stating the worker's job title and guaranteed salary, an application for employment, and various check copies.

The firm's response states it is a real estate and property management agency. The work provided by the worker was as a real estate associate. The worker was requested to perform any job that required a real estate license. The firm provided a letter to us indicating why they classified the worker as an independent contractor as well as an employment agreement and copies of bounced checks.

The firm states that they did not provide the worker with any instruction or training. The worker would receive job assignments based upon their consultant agreement. The worker would determine the methods by which job assignments were performed. If the worker encountered any issues during their job duties, the manager and worker would both be responsible for problem resolution. The worker was required to communicate with the firm via e-mail communication. The firm was unaware of the worker's routine as they were treated as a licensed independent contractor. The worker would perform services at their home or other brokerage office. The worker would attend meetings when the firm would request it, no penalties given if they did not attend. The worker was personally required to perform services. Helpers or substitutes were not applicable to the work situation. The worker states that the firm provided continual instruction on tasks on a daily basis. The worker received job assignments through email, phone, and texts. The worker states that the president of the firm determined the methods by which job assignments were performed and assumed responsible for problem resolution. The worker provided the firm with detailed work reports that were modified and finalized by the firm's president. The worker's routine involved calling and prospecting leads and checking their emails to follow up on tasks. The worker states that they were responsible for taking care of tenant and owner needs of the property management aspect of the firm. The worker would go to various properties and other tasks were remotely performed. The worker was mandated to attend all company and performance meetings and perform services personally. The worker states that the president assigned an intern to the worker to assist with emails. The firm was responsible for hiring and paying all helpers.

The firm states that they did not provide anything for the job duties. The worker did not lease any space, facilities, or equipment. The worker did not have any expenses reimbursed by the firm. The worker was paid on a commission basis. They did not have access to a drawing account for advances. The firm did not carry worker's compensation insurance on the worker. Customers would pay the firm for services rendered. The firm states that the worker had no exposure to economic loss or financial risk. The worker did not set the level of payment for services rendered. The worker states that the firm provided the worker with a camera to photograph properties, and the worker provided a car, phone, and all other supplies. The worker incurred travel expenses when they traveled to various client properties. The worker states that any business-related expenses such as business lunches would be reimbursed by the firm. The worker states that they were paid a salary with a \$120k salary guaranteed minimum. The worker provided a letter from the firm stating that they were paid a salary with a guaranteed minimum. Customers would pay the firm, and the firm's president set the level of payment for services rendered. The worker had no exposure to economic loss or financial risk.

The firm states that they did not offer the worker any benefits. The work relationship could be terminated by either party without liability or penalty. The firm states that the worker performed similar services for other firms during the terms of the work relationship and did not need permission from the firm to do so. 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 worker was represented by the firm as a licensed broker associate performing services under the firm's name. The work relationship ended due to a lack of business. The firm provided the worker with client contact information and the worker was required to update the firm's managers on leads provided. There was no set territory for the worker. Orders submitted by the worker were subject to the approval of the firm. The worker states that they were coerced to write a check to draw from in order to keep the worker from asserting employee rights. The worker states that they did not provide similar services for other firms during the work relationship. The worker advertised their services to the public on business cards provided by the firm. These business cards represented the worker as a vice president of the firm, and emails would represent the worker the same way. The worker provided copies of an email exchange between the parties where the firm president states the worker's title as such, not real estate agent. The worker also provided a text exchange between the parties where the firm states the worker's title as VP, not real estate agent as firm states. The work relationship ended when the firm terminated the contract.

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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 of property management. 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 and was guaranteed a minimum salary. 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.