

**SS-8 Determination—Determination for Public Inspection**Occupation  
09DVC DriverDetermination:  
☒ 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 firm is in the business of delivering baked goods to retail outlets. The worker was engaged as a driver and merchandiser to assist the firm in delivering and merchandising the products to retail outlets. He received a 2012 and 2013 Form 1099-MISC for his services. There was no written agreement.

The worker was provided with a route schedule; he assisted the firm with its work duties. The firm assigned all routes on a daily basis. The firm noted that the worker was experienced so both parties mutually determined the methods by which the assignments were performed. Both also agreed that the firm would be contacted if any issues or problems arose. Only the worker mentioned that the delivery receipts were turned over to the firm. The worker's routine consisted of arriving at the warehouse in the morning to load the truck with shipments for the day; he then completed deliveries and returned to the warehouse early in the afternoon. The firm noted that he worked five days a week, approximately 5AM to 11AM. He performed his services at customers' retail locations. Only the worker indicated that there was a morning meeting to review the route for the day. The worker noted that he was to provide the services personally. Both parties agreed that only the firm hired and paid substitute workers.

Both the firm and the worker agreed that the firm provided all the merchandise and the delivery truck. The firm paid all expenses according to the worker; he received a salary and had no other economic risk. The firm indicated that the worker was paid a daily rate. Both parties agreed that the customer paid the firm and that the worker did not establish the level of payment for services.

Both the firm and the worker agreed that there were no benefits and that either party could terminate the relationship without incurring a liability. The worker did not perform similar services for others during the same time period though the firm disagreed. Only the worker indicated that he performed his services under the firm's name. Both agreed that the worker had no responsibility in soliciting new customers. The worker did not sell any product but simply distributed bakery goods. His only job was to deliver and stock bakery products. Both agreed that the worker quit.

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## Analysis

In determining whether an individual is an employee or an independent contractor under the common law, all evidence of both control and lack of control or independence must be considered. The relationship of the worker and the business must be examined. Facts that show a right to direct or control how the worker performs the specific tasks for which he or she is hired, who controls the financial aspects of the worker's activities, and how the parties perceive their relationship should be considered. As is the case in almost all worker classification cases, some facts point to an employment relationship while other facts indicate independent contractor status. The determination of the worker's status, then, rests on the weight given to the factors, keeping in mind that no one factor rules. The degree of importance of each factor varies depending on the occupation and the circumstances.

Factors that illustrate whether there is a right to control how a worker performs a task include training and instructions. In this case, 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 experienced in this line of work. However, the firm assigned him to his delivery route as well as what bakery products should be delivered. The firm also indicated that the worker was engaged initially part-time to fill-in for other drivers before working continuously. The worker worked according to the firm's hours and needs. The establishment of set hours of work by the person or persons for whom the services are performed is a factor indicating control. If the nature of the occupation makes fixed hours impractical, a requirement that workers be on the job at certain times is an element of control. Since only the firm would hire and pay any substitute workers, the worker was required to provide the services personally. 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. This was understandable as the worker was experienced in distributing baked goods, and was possibly engaged for that reason. In addition, the worker provided his services on a continuous basis throughout the time period involved whether part-time or on a regular basis. A continuing relationship between the worker and the person or persons for whom the services are performed indicates that an employer-employee relationship exists. A continuing relationship may exist where work is performed in frequently recurring although irregular intervals.

Factors that illustrate whether there is 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 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. It was the firm that had the investment in the merchandise and the vehicle. The worker received a set salary or set daily rate of pay; he had no other economic risk other than loss of that compensation. Payment by the hour, 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.

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. There were no benefits and there was no written agreement. The worker was engaged as delivery driver who delivered bakery items and stocked the retail customers' stores. When doing so, the worker was not engaged in an separate business enterprise. His services instead were essential and necessary to the firm's continuing operations which was to provide those services to its customers. 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 firm had indicated that both parties agreed to the independent contractor relationship. However, in *Bartels v. Birmingham*, 332 U.S. 126, 1947-2 C. B.174, the Supreme Court stated that whether there is an employment relationship is a question of fact and not subject to negotiation between the parties.

It is acknowledged that the firm also pointed out that the worker performed similar services for others during the same time period. If a worker performs more than de minimis services for a multiple of unrelated persons or firms at the same time, that factor generally indicates that the worker is an independent contractor. See Rev. Rul. 70-572, 1970-2 C.B. 221. However, it is possible for a person to work for a number of people or firms concurrently and be an employee of one or all of them.

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.

Please see Publication 4341 for guidance and instructions for firm compliance.