

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

Occupation

09DVC Drivers &amp; Vessel Control

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 July 2016 to September 2017 as a fishing boat captain. The work done by the worker included taking the firm's customers on fishing charters. The firm issued the worker Form 1099-MISC for the years in question. The worker filed Form SS-8 as he believes he erroneously received Form 1099-MISC.

The firm's response states it is a charter fishing company which offers a variety of different types of fishing primarily during spring break and summer. The worker was engaged as a fishing guide/captain. He performed the services of taking groups of people charter fishing. The worker was an independent contractor as he could accept or deny each trip offered to him based on his schedule. The worker was to provide his own rods, reels, knives, pliers, and other supplies. Pay varied depending on the length of the fishing trip. His services were requested on a seasonal, as-needed basis. The worker signed Form W-9, Request for Taxpayer Identification Number and Certification. Many deckhands and captains freelance and work for multiple companies throughout the season. It is common industry practice to issue them Form 1099-MISC for the season. There was no written agreement between the parties.

The firm stated it did not provide specific training or instruction to the worker. The firm called or sent a text to the worker offering work assignments. The worker determined the methods by which assignments were performed. If problems or complaints arose, the worker was required to contact the firm. Dependent on the situation both parties could be at fault or solely the worker. Rules are regulated by the United States Coast Guard. Reports and meetings were not required. The worker did not have a daily routine. Services were performed at the firm's marina/dock. The firm required the worker to personally perform services. The firm was responsible for hiring and paying substitutes or helpers if the worker was unable to perform services. The worker stated the firm instructed him on how and where to take the firm's customers fishing, along with how to use the firm's equipment. The firm determined the methods by which assignments were performed and it assumed responsibility for problem resolution. The worker provided the firm a verbal overview (report) of each charter. Prior to each charter, he was required to fuel the firm's boat, get ice, and prepare tackle. He was not paid for these required tasks. He was only paid for the duration of the charter, i.e. 6 am to 10 am. The worker picked up the firm's equipment and its customers at the firm's place of business. He then took them on the firm's boat for the charter.

The firm stated it provided the boat, fuel, and customers. The worker provided and incurred the unreimbursed expense associated with fishing rods, reels, pliers, knives, gloves, GPS, and any other tools or equipment needed during the fishing trip. The worker did not lease equipment, space, or a facility. Customers paid the firm. The firm paid the worker piece work; a drawing account for advances was not allowed. The firm did not carry workers compensation insurance on the worker. The worker's economic loss or financial risk related to loss or damage of personal supplies and equipment. The firm established the level of payment for the services provided. The worker stated the firm also provided the bait, ice, tackle, advertising, booking of charters, and insurance. The worker provided his U.S. Coast Guard Captain's License. He did not incur unreimbursed expenses as the firm provided all the equipment necessary. Time records, provided by the worker, document the firm paid him an hourly rate of pay and tips, in addition to reimbursing him for tackle. The worker stated he did not incur economic loss or financial risk.

The firm stated the work relationship could be terminated without penalty. The worker did perform similar services for others; the firm's approval was not required for him to do so. There was no agreement prohibiting competition between the parties. The worker advertised on social media accounts and with business cards. The firm did not represent the worker to its customers. The work relationship ended when the fishing season was over and the firm no longer needed the worker's services. The worker stated he did not perform similar services for others or advertise. The firm's owner verbally asked for exclusivity from the worker. Services were performed under the firm's business name.

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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. The firm provided work assignments by virtue of the customers served and it ultimately 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 firm had a significant investment in its boat and fuel, in addition to assumed risks in connection with its business operations. The worker did not have a significant investment 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 the worker presumably used fishing gear for his personal needs, it is not considered a significant investment. Based on the documented hourly rate of 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 and legal research related to boat captains, 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.