

## SS-8 Determination—Determination for Public Inspection

Occupation

09DVC Drivers & 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 firm is in the business of operating a delivery only restaurant. The worker was engaged as a delivery driver. He received a 2017 Form 1099-MISC for his services. There was no written agreement provided.

The firm noted that it provided no training or instructions; however the worker received on-the-job training by riding along with another driver for a day. Both parties agreed that the worker received his work assignments through an app message from the firm with a schedule on it for the day. Each party indicated that the other determined the methods by which the assignments were performed. The worker noted that the firm would be contacted if any issues or problems arose. There were no required reports. The worker's routine consisted of showing up for work and delivering the food orders to customers. He reported to work at the firm's location and made deliveries from his car. There were no meetings. The worker was required to personally provide the services with only the firm hiring any substitutes; the firm disagreed.

According to the worker, the firm provided the phone app and the food to be delivered though the firm noted that it provided nothing. The worker supplied the phone and the car. He was paid an hourly rate with tips and incurred wear/tear on his personal vehicle. The firm noted that the worker's pay was based on what the worker chose for an agreement and tip; however, no written agreement was provided. The customer paid the firm. Both parties agreed that the firm set the prices and rates.

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 perform similar services for others. The relationship has ended.

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## Analysis

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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. 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 firm prepares and sells food as well as provides delivery of their prepared food. The firm engaged the worker to provide part-time delivery services according to its scheduled needs through its app. 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. Also, if a worker must perform services in the order or sequence set by the person or persons for whom the services are performed, that factor shows that the worker is not free to follow the worker's own patterns of work. Often, because of the nature of an occupation, the person or persons for whom the services are performed do not set the order of the services or set the order infrequently. However, if the person or persons retain the right to control the order or sequence of the work, this is sufficient to indicate an employer-employee relationship. While the worker's services were for a limited number of hours, those services were continuous. 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. The worker had no investment in a delivery business. His personal vehicle would not be considered a significant investment as it would be used for other purposes as well as used by the worker for deliveries. He received an hourly rate of pay and had no other economic risk other than the loss of his 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 provided. The worker was engaged to provide labor for the firm's food delivery business. When doing so, the worker was not engaged in a separate business venture. The fact that his services were for limited hours did not make him self-employed. 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.

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.