

## 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 providing dump truck hauling. The worker was engaged as a driver to drive the firm's truck. He received a Form 1099-MISC for his services in 2017 and 2018. There was no written agreement.

Both the firm and the worker agreed that the firm determined the methods by which the assignments were performed and would be contacted if any issues or problems arose. The firm obtained the hauling jobs, and would, in turn, give the worker the job location to go to. The worker turned in daily tickets and reported if the job was not safe; the firm noted he turned in a timesheet. The worker reported to work in the mornings to get the truck; there were no specific set times as the worker worked when work was needed and available. He worked at various job sites. Both parties agreed that there were no meetings. The worker was to provide the services personally with only the firm hiring and paying any substitutes.

Both the firm and the worker agreed that the firm provided the gas and the dump truck. Both also agreed that he was paid an hourly rate. The customer paid the firm. According to the worker, the firm established the level of payment for services.

There were no benefits. Either party could terminate the relationship without incurring a liability. The worker did not 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 obtained the jobs and remained responsible to its customers. The worker needed no training as a driver. He was given his work/job assignments by the firm which would have included instructions on the location of the jobs, when he was needed, and what the job entailed. While his work schedule may have varied, dependent on the jobs and the weather, 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. The worker performed services in the order or sequence set by the firm. 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. Although the worker provided his services for a brief period of time, it was 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 the truck that he drove, and therefore, had no risk. Lack of significant investment by a person in facilities or equipment used in performing services for another indicates dependence on the employer and, accordingly, the existence of an employer-employee relationship. In addition, the worker received an hourly rate of pay. 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. 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.

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 no written agreement. The worker was engaged as a truck driver for the firm's hauling business. When doing so, the worker was not engaged in a separate business venture. 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.

It is acknowledged that the firm may have informed the worker that the driver position was one of an independent contractor. 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. So even if the worker agreed to an independent contractor designation at the time of hire, that did not establish the type of work relationship when the facts support one of employer-employee.

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.