

**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 January 2017 to December 2018 as a driver. The firm issued the worker Form 1099-MISC for 2017 and 2018, as well as Form W-2 for both tax years. The worker filed Form SS-8 as they believe they received Form 1099-MISC in error. There was no written agreement between the parties. The worker believes they were an employee because they were not self-employed and they filled out all of the appropriate forms for tax to be withheld from their pay at the beginning of their work relationship with the firm.

The firm's response states it is a chauffeur transportation company, offering transportation via a variety of vehicles. The work provided by the worker was that of a driver. The worker was requested to drive clients to their requested destinations as requested by the client reservations. The firm states that the worker set their own schedule and was able to turn down job assignments that they did not wish to work. The firm provided copies of both Form 1099-MISC and Form W-2 that they had issued the worker for both tax years in question.

The firm states that the worker was given safety training by the firm as well as a review of the vehicles they were to operate during their job duties. The firm states that the worker received work assignments by email or over the phone. In addition, the worker could also pick up trip tickets from the firm's office. The firm states that the firm's owner determined the methods by which assignments could be performed. The firm states that if problems or issues arose during job duties, the worker would be required to first contact the firm's dispatch office or the firm's management. The worker was not required to furnish the firm with reports, but they did have to report on when the assigned trip would start and end. The firm states that there was no set schedule for the worker, as jobs were assigned on an as-needed basis. If the worker accepted the assignment, they would be required to show up to the vehicle's location one hour prior to the start of the trip to review the trip instructions as well as check over the vehicle. The firm states that the worker would be required to pick up and drop off the vehicle at the firm's location, and no meetings were required of the worker. The worker was required to perform all services personally, and if helpers or assistants were required it was the responsibility of the firm to hire and pay them. The worker states that they received training and instruction regarding each job on a per job basis which would explain the customer name, time of job, and the pickup and drop off locations. The worker states that they received assignments through a driver application, email, or phone. The firm's owner determined the methods by which assignments were performed, and all problem resolution and instruction came from the firm's office. The worker states that the firm required reports on pick up and drop off times for each job assignment. The worker states that they performed job assignments at the firm location and at the customer locations. The worker states that they reported to the office on a daily basis for assignments and staff meetings.

The firm states that they supplied the worker with a vehicle and a trip sheet, and that the worker only needed to supply a phone to receive job assignments. The worker did not have to lease facilities, space, or equipment. The firm states that the worker would ask for advances that were given at the discretion of the firm. The worker did not incur any expenses in the performance of job duties. The customer would pay the firm, and the firm set the level of payment for all services rendered by the worker. The firm states that the worker did not have any exposure to economic loss or financial risk. The firm carried worker's compensation insurance on the worker. The worker states that they were paid an hourly wage and did not have access to a drawing account for advances.

The firm states that they did not offer the worker any benefits. The work relationship could be terminated at any time without incurring loss or liability. The firm states that they were unaware if the worker performed similar services to any other firm at the time they were employed with the firm. The firm states that the worker was allowed to work for any firm without requiring approval as there were no restrictions. The firm states that they represented the worker as a representative of the company. The work relationship ended when the worker was fired from the job. The worker states that they were offered bonuses around Christmastime depending upon the mood of the firm's owner. The worker states that they did not provide similar services to any other firm at the time they were working for the firm. The worker states that they were not a member of a union and they did not advertise their services to the public. The worker states that the work relationship ended when they were fired from the firm.

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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, required the worker to report on service pick up and drop off times, 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. 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 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, 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.