

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

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| Occupation<br>03MIS | Determination:<br><input checked="" type="checkbox"/> Employee <input type="checkbox"/> Contractor  |
| UILC                | Third Party Communication:<br><input checked="" type="checkbox"/> None <input type="checkbox"/> 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 2015 to 2018 as a mechanic. The services performed by the worker included repairs and maintenance of trucks used for transportation of customer goods. 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 long/short haul transportation business. The worker was engaged as a mechanic. The worker was classified as an independent contractor as he set his own hours, was called when needed, and paid upon completion or each repair. The worker had several other verbal contracts for work and he worked for the firm at-will. There was no written agreement between the parties.

The firm stated it did not provide specific training or instruction to the worker. The worker was contacted when needed for mechanical repair work. Upon arriving, he was told the issue needing repair and he made repairs independently. The worker conferred with the firm prior to assignment to determine the methods by which assignments were to be performed. If problems or complaints arose, the firm was contacted and responsible for resolution. Reports included a log of repairs documenting the date and vehicle repaired. The worker set his own hours and schedule. Services were performed at the firm's premises. Meetings were not required. The firm required the worker to personally perform services. The firm's approval to hire substitutes or helpers was required. If applicable, the worker would have paid his own helper. The worker stated the firm instructed him each work day when providing a work order. The firm determined the methods by which assignments were performed. His daily routine consisted of usually working 8 am to 5 pm. The firm was responsible for hiring and paying substitutes or helpers.

The firm stated it provided tools and equipment on hand. The worker provided and incurred the unreimbursed expense associated with his personal tools and equipment. The worker did not lease equipment, space, or a facility. Customers paid the firm. The firm paid the worker based on the time involved in the repair, i.e. labor charged. The worker was not allowed a drawing account for advances. The firm did not carry worker's compensation insurance on the worker. The worker did not incur economic loss or financial risk. The worker established the level of payment for the services provided. The worker stated the firm provided the building to work in, trucks that needed service, tools, and parts. He provided his knowledge and skills. He did not incur expenses in the performance of services for the firm. The firm paid him an hourly rate of pay and established the level of payment for the services provided.

The firm stated the work relationship could be terminated by either party without incurring liability or penalty. The worker performed 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. It is unknown if the worker advertised. The work relationship ended when the worker stated he needed employment with benefits. The worker stated benefits were not provided. He did not perform similar services for others or advertise. He quit after securing another job.

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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 mechanical repair services performed by the worker were integral to the firm's business operation. The firm provided work assignments, required the worker to confer prior to performing services, required the worker to report on services performed, 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.

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 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. As acknowledged by the firm, the worker did not incur economic loss or financial risk. Based on the time involved or 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.