

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

Occupation Construction/Technical Services/Trades	Determination: <input checked="" type="checkbox"/> Employee <input type="checkbox"/> Contractor
UILC	Third Party Communication: <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 is seeking a determination of worker classification for maintenance and property management services performed for the firm from June 2019 until November 2019. The worker received a 1099-MISC from the firm for 2019. The worker feels that they were misclassified as an independent contractor because they were paid semi-monthly, they were given daily assignments by the firm, and the firm supervised the worker and set their schedule. There were no written agreements between the parties.

The firm states that it provides maintenance for a medical complex. The worker was requested to oversee maintenance matters throughout the complex's buildings and campus grounds. The firm believes that the worker was an independent contractor because the worker performed duties as needed.

The firm states that there was no training provided to the worker as the worker already had specific skills and knowledge needed for their job tasks. The worker was given daily instructions by the firm verbally and through text messages. The manager of the firm determined the methods by which job assignments were performed. If the worker encountered any problems or complaints during their job duties, they were required to contact the manager for problem resolution. The worker was not responsible for any reports. The worker typically provided services from 9am until 5pm, with some tasks being performed after hours or over the weekend. All job duties were performed at the medical facility complex. There were no formal meetings, but the worker and firm owner would meet weekly for briefings. The worker was not required to perform services personally. The manager was responsible for hiring and paying all helpers needed. The worker states that they received daily job assignments regarding maintenance and repair job duties. These job duties were assigned either verbally, through text, through an app, or written on a whiteboard. The worker was required to contact the firm owner for problem resolution. The worker was required to report back to the firm owner about completion of job assignments. The worker performed services from 8am until 4pm Monday through Friday, with both daily and weekly job assignments. All work was performed at the firm's premises. The worker states that they were required to attend weekly maintenance meetings and to perform services personally. The firm hired and paid all help needed.

The firm states that they provided all tools, supplies, and equipment. The worker provided nothing for their job duties, did not lease anything, and did not incur any expenses. The worker was paid a salary base and would be paid an hourly rate for side projects. The worker was given access to advances on two separate occasions by the firm. Customers paid the firm. The firm carried worker's compensation insurance on the worker. The worker faced no economic loss or financial risk during their job duties. The firm's manager established the level of payment for services provided. The worker states that the firm provided all materials, supplies, and tools needed. The worker was paid a salary twice monthly. The worker states that they had no exposure to economic loss or financial risk. The firm set the level of payment for services provided.

The firm states that they provided paid vacations, sick pay, paid holidays, and personal days as benefits. The relationship between the parties could be terminated by either party without liability or penalty. The firm states that the worker did perform similar services for other firms and did not need approval from the firm to do so. There were no non-compete agreements in place between the parties. The worker was not a member of a union and did not advertise their service to the public. The firm states that they represented the worker as an employee performing maintenance services. The worker was fired, and the relationship ended. The worker states that the firm offered sick days as a benefit. The worker states that they did not provide similar services for other firms during the relationship. The worker was represented by the firm as an employee. The work relationship ended when the firm owner fired the worker.

---

## 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 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.

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 salary and 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.