

**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 services performed as a generator mechanic for the firm from June 2019 until January 2020. The worker received a 1099-MISC for 2019 and a 1099-NEC for 2020 from the firm. The worker feels that they were misclassified as an independent contractor because they wore a uniform, followed the firm's schedule, and worked under the firm's owner.

The firm states that it provides the public with generator repair. The worker was requested to provide assistance in the firm's shop as well as generator maintenance. The firm classified the worker as an independent contractor because they were told when hired they were providing services for a trial period of time. There were no written agreements between the parties.

The firm states that the worker was trained by the main worker for the firm. The main worker would request the worker to come in and follow them on the job and assist with various tasks. This main worker would also be responsible for determining how tasks were performed and resolving any problems encountered by the worker. There were no reports required of the worker. The worker states that the firm's owner gave instructions on how to repair and do maintenance on generators. The worker received job assignments in person and through the phone. The firm's owner determined the methods used to complete job tasks. If the worker encountered problems or complaints while working, they were required to contact the firm's owner for problem resolution. The worker provided the firm with general maintenance reports on generators. The worker performed services Monday through Friday from 8am until 5pm. They would travel to various customer locations to service generators. There were no meetings required of the worker, and the worker was required to personally perform services. The firm's owner was responsible for hiring and paying all helpers and substitutes needed.

The firm states that they provided wrenches, screwdrivers, and hammers. The worker provided wrenches. The worker did not lease any space, facilities, or equipment. The worker incurred no expenses, and the firm would occasionally reimburse the worker for fuel if they had to use their personal vehicle to get to a job site. The firm paid the worker an hourly wage with no access to a drawing account for advances. Customers paid the firm, and the firm did not carry worker's compensation insurance on the worker. The worker had no exposure to economic loss or financial risk. The worker states that the firm provided a work shirt and oil for generators. The worker provided tools and their truck. The worker did not lease anything and did not have any expenses. The firm reimbursed the worker for mileage, food, and some fuel. The worker was paid an hourly wage with no access to a drawing account for advances. Customers paid the firm. The worker had no exposure to economic loss or financial risk. The firm's owner established the level of payment for services provided.

The firm states that they did not provide the worker with any benefits as they were contract labor. The relationship between the parties could be terminated by either party without liability or penalty. The worker did not provide similar services to other firms. There were no non-compete agreements in place between the parties. The worker was not a member of a union. The firm states that they represented the worker as an employee performing services under the firm's name. The work relationship ended when the worker found another job and was planning to return back to school. The worker states that there were no benefits offered and they did not provide similar services to other firms during the work relationship. The worker was not a member of a union and did not advertise their services to the public. The worker was represented by the firm under the firm's name. The worker left the firm's employment to seek work elsewhere.

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## Analysis

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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 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.