

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

Occupation 02ABT Accountants/Bookkeepers/Tax Preparers	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**

Information provided indicated the firm is a commercial real estate business. The worker performed services as the firm's operations manager from 2010 through 2017. The firm reported income from 2010 through 2014 on Form W-2. In 2014 the worker indicated the firm converted everyone to independent contractors. She indicated there was no difference in the services performed. The firm reported her income on Form 1099-MISC for tax years 2014 through 2017. The worker indicated she was paid by the hour and a percentage of net profit sharing. She still utilized a company provided credit Card. She was provided pensions and bonuses. She performed services Monday through Friday eight-thirty to five-thirty. All services were performed on firm premises, utilizing the firm's equipment and supplies. She was required to be at all company meetings, team meetings and annual business plan reviews.

The firm indicated from 2010 through 2014 she was an employee and executive assistant. The firm indicated after that she worked on special projects such as advertising, marketing, move management/coordination, sourcing & bid management of outside service providers, bookkeeping, web design and vendor management. The worker controlled the time, place and the work she performed. She was provided projects but decided how to get the project completed. The firm approved the ultimate result and due date for each project. She could accept or decline any project. The firm stated they provided a description and goals of the project. Work assignments were given at the request of the brokers of the firm. The firm indicated she determined her place of work and the firm provided her with a work station if she preferred to work at the firm office. She was required to perform her services personally. The firm indicated she was given partner profit sharing and an hourly rate for the work performed. In special circumstances cash advances were given, for profit sharing only. The customer continued to pay the firm. The firm indicated she was represent as a partner/agent. The firm indicated the worker ended the work relationship.

The firm provided a copy of the profit sharing agreement. It stated the worker would be a "partner" for marketing purposes only and to signify her eligibility to participate in the profit sharing program. The worker's share was to be ten percent. However, future years the firm determine the right for her to participate and/or to modify that percent. It was the firm's sole discretion to add new key "team members". In that case each share may be proportionately reduced.

**ANALYSIS**

The question of whether an individual is an independent contractor or an employee is one that is determined through consideration of the facts of a particular case along with the application of law and regulations for worker classification issues, known as "common law." Common law flows chiefly from court decisions and is a major part of the justice system of the United States. Under the common law, the treatment of a worker as an independent contractor or an employee originates from the legal definitions developed in the law and it depends on the payer's right to direct and control the worker in the performance of his or her duties. Section 3121(d)(2) of the Code provides that the term "employee" means any individual defined as an employee by using the usual common law rules.

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.

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. We must examine the relationship of the worker and the business. We consider 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. The degree of importance of each factor varies depending on the occupation and the context in which the services are performed.

Therefore, your statement that the worker was an independent contractor pursuant to an 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.

---

## Analysis

---

We have applied the above law to the information submitted. As is the case in almost all worker classification cases, some facts point to an employment relationship while other facts indicate independent contractor status. 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.

Evidence of control generally falls into three categories: behavioral control, financial control, and relationship of the parties, which are collectively referred to as the categories of evidence. In weighing the evidence, careful consideration has been given to the factors outlined below.

Factors that illustrate whether there is a right to control how a worker performs a task include training and instructions. In this case, you retained the right to change the worker's methods and to direct the worker to the extent necessary to protect your financial investment.

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.

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 your business. Both parties retained the right to terminate the work relationship at any time without incurring a liability.

### Conclusion:

Based on the above analysis, we conclude this is an erroneous misclassification of employment. The firm continued 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. As per the contract, the worker was to be listed as a partner, only for marketing purposes. Throughout the contract, it was specified the firm held control over payment of services, hiring, adjusting payments given. The services provided by the worker did not change. She continued to perform the services on a full time basis. The firm indicated she continued to be paid by the hour, as well as the profit sharing. Income earned by a partner would be deemed wages and reportable on Form W-2, in any case. The worker indicated she did in fact continue a full time work schedule on firm premises. No indication, or documentation was provided to substantiate the worker owned an operated her own business, to provide the continued services.