

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

Occupation 02ADM Administrators	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 initiated the request for a determination of his work status as office administration/secretarial work in tax year 2017 to January 2018. The firm's business is described as insurance sales of supplemental policies for seniors.

The firm's response was signed by the owner, a self-employed insurance agent. The firm's business is described as an insurance agency. The worker performed services as an administrator, with duties that included but were not limited to answering phones, processing insurance applications, ordering supplies, filing, and data entry.

According to the firm, the worker was given limited training/instructions. The worker's job assignments were delivered via an inbox on his desk, by email, phone call, or text message. The worker, referred to as a '1099 employee/contractor', determined the methods by which the worker's services were performed. Any problems or complaints encountered by the worker he was required to fix, and if not they were directed to the firm for resolution. The services were rendered on the firm's premises. The worker was required to log his hours and submit an invoice to the firm; he would check in and out on his own free will, process work in the inbox, answer phones, and take messages. The firm provided copies of the worker's time sheet that reflected date, start time, break/lunch and end time, and total hours worked. The worker was required to perform the services personally.

The worker concurred that he received training and instructions and his job assignments from the owner on what she wanted done. The firm determined the methods by which the worker's services were performed; any problems or complaints encountered by the worker were directed to the firm for resolution. The worker performed the services on the firm's premises from 8 am to 5 pm, Monday through Friday. He was required to perform the services personally.

The firm and worker acknowledge the firm provided the computer, fax, and phone; the worker furnished a cell phone. The worker did not lease equipment, space, or a facility; but, did incur expenses for cell phone and transportation. The firm paid the worker an hourly wage. The worker was not at risk for a financial loss in this work relationship. The worker did not established level of payment for services provided or products sold.

Both parties responded that no benefits were extended to the worker. Either party could terminate the work relationship without incurring a liability or penalty. The worker was not performing same or similar services for others during the same time frame.

The firm indicated the worker was a contracted assistant/administrator; the firm provided a copy of the '1099 Employment Agreement' for the worker's services as an administrator to provide general office duties as assigned by the agency owner. In addition, the worker's responsibilities included making multiple phone calls on behalf of the agency, collecting data, assisting with recruiting, processing all agents' new business, completing all filing, scanning, and updates to data program, completing all duties assigned by the agency within time lines set by agency. The agreement references that worker attests that he is a 1099-employee and responsible for all taxes; services cannot be rendered in excess of 40 hours per week at \$X/hour. After the 90-day review there would be an opportunity to earn \$Y/hour; and, after 9 months of employment there would be an opportunity for \$Z/hour. All additional reviews would be annually.

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## Analysis

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A worker who is required to comply with another person's instructions about when, where, and how he or she is to work is ordinarily an employee. This control factor is present if the person or persons for whom the services are performed have the right to require compliance with instructions. Some employees may work without receiving instructions because they are highly proficient and conscientious workers or because the duties are so simple or familiar to them. Furthermore, the instructions, that show how to reach the desired results, may have been oral and given only once at the beginning of the relationship.

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.

Payment by the hour, 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.

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.

The firm's 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.

We have considered the information provided by both parties to this work relationship. In this case, the firm retained the right to change the worker's methods and to direct the worker to the extent necessary to protect its financial investment and business reputation and to ensure its customers' satisfaction and that its contractual obligations were met. The worker was not operating a separate and distinct business; 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. Integration of the worker's services into the business operations generally shows that the worker is subject to direction and control. When the success or continuation of a business depends to an appreciable degree upon the performance of certain services, the workers who perform those services must necessarily be subject to a certain amount of control by the owner of the business. 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.

## CONCLUSION

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.