

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

Occupation 02OFF Office Workers	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 a store clerk with duties that included opening and closing the store, receiving and stocking merchandise, cleaning, assisting customers, and reconciling the register, in tax year 2018. The firm's business is described as a retail business. The worker stated that from January 1, 2018 until August 29, 2018 he was issued checks with withholdings on a regular bi-weekly basis. As of August 30, 2018 he was a contractor and was forced to sign a back-dated contract. He stated the firm issued him a check for the taxes withheld and a letter of explanation.

The firm's response was signed by the owner. The firm's business is retail sales of beer and wine-making supplies. The worker's duties were to assist customers, keep store clean, and receive merchandise shipments. The worker was considered a contract employee because he was not full-time and worked as needed.

The firm and worker responses indicate the worker was given hands-on training including the POS system. The job assignments were conveyed verbally and in writing. 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's services were rendered at the firm's business location as scheduled. The worker was not required to perform the services personally.

The firm provided a work shirt. The worker furnished nothing, he did not incur expenses, and he did not lease equipment, space, or a facility. Both parties confirmed the firm paid the worker an hourly wage and the customers paid the firm. The worker was not covered under the firm's workers' compensation insurance policy. The worker did not establish level of payment for services provided or products sold.

There were no benefits 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 worker provided the following: a copy of the Independent Contractor agreement for the position of sales associate; the list of job duties which included dusting, sweeping, mopping, washing dishes, cleaning the drip tray, Windexing the doors, facing and restocking of merchandise, and checking in and putting away incoming merchandise and then sending a picture to an owner; a copy of the firm's business card with the worker's name on it; and, a copy of the letter and check issued to worker regarding the taxes that had been withheld.

The firm provided a list of the checks issued to the worker for the year at issue.

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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.

Training a worker by requiring an experienced employee to work with the worker, by corresponding with the worker, by requiring the worker to attend meetings, or by using other methods, indicates that the person or persons for whom the services are performed want the services performed in a particular method or manner. This is true even if the training was only given once at the beginning of the work 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.