

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

Occupation 02RET Retail 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

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**Facts of Case**

The worker initiated the request for a determination of his work status as an assistant showroom manager in tax years 2016 to 2017, for which he received Form W-2 and Form 1099-MISC. In this capacity, he was a writer for the company's digital magazine, he did cleaning and maintenance, shipping and receiving, inventory, vendor contacts, floor staff training, and made reservations for the owner's trips. The firm's business is described as retail interior design sales shop and digital magazine. The worker noted he had provided services in 2014 (he was issued Form 1099-MISC), 2015 (he was issued Form W-2), 2016 (he was issued Forms W-2 and 1099-MISC), and 2017 (he was issued Form 1099-MISC); he was an employee and was laid off, and, when he was re-hired there was an increase in responsibilities.

The firm's response, signed by the president, described the firm's business as retail sales of furniture and accessories and design services. The worker was asked to assist with setting up the showroom, unpackaging new shipments of furniture, and doing miscellaneous tasks around the store. He also occasionally wrote for the firm, since he is a good editor. In a conversation, with the firm, it was stated that in March of 2016, the firm was suffering from a severe lack of business. The company decided to completely restructure. The worker was laid off as an employee and the company reorganized, changing the business model entirely from a furniture rental and staging business to a retail store. The name was changed, the website was changed, and the business model was changed, essentially starting a new business. This took over a year to restructure. As the firm neared operating under the new business model, the worker was asked if he might be available on an "as needed" basis, specifically in helping prepare the store for business. This work was a temporary job that needed filling and would not require hiring someone in a permanent position. The worker returned and was providing primarily manual labor; he helped with moving furniture around, and continued providing same/similar services of odd jobs until he quit in 2017. The worker did not have his own business – he did odd jobs when he was asked.

The worker indicated he was given verbal instructions and job assignments from the firm; and, it was the firm that 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. His routine consisted of opening and closing the showroom, customer sales and service, inventory, cleaning and maintenance, shipping and receiving, writing articles for the company's digital magazine, making flight and hotel reservations for the owner's trips, and staging homes for sale which were rendered primarily from the firm's premises and additional work from his home for writing and research. The worker was required to perform the services personally; any additional personnel were interviewed by the worker and were hired and paid by the firm.

According to the firm, the worker was given direction by the business manager or owner. The job assignments and the methods by which the worker's services were performed was determined by the firm. Any problems or complaints encountered by the worker were directed to the firm's business manager for resolution. The worker's services were rendered at the firm's place of business. The worker was required to perform the services personally.

The worker stated the firm provided a computer, cash register, and phone; and, that he furnished an iPad, cell phone, laptop, printer, digital camera, and books for research. He did not lease equipment, space, or a facility. The firm paid the worker an hourly wage. The customers paid the firm; the money paid to the worker went through the cash register. The worker indicated he was covered under the firm's workers' compensation insurance policy. The worker was at risk for a financial loss in this work relationship if there was damage to the property he purchased. The firm established the level of payment for services provided and the products sold.

The firm responded that packing materials were provided. The worker furnished a computer. The worker did not incur expenses. The firm paid the worker an hourly wage. The customers paid the worker who turned the entire amount over to the firm. There was no response as to whether the worker was/was not covered under the firm's workers' compensation insurance policy. The worker was not at risk for a financial loss in this work relationship. The firm stated the worker and firm agreed on what he would be paid for his services.

Both parties acknowledged there were no benefits extended to the worker and that either party could terminate the work relationship without incurring a liability or penalty. The firm indicated the worker was performing same or similar services for others during the same time frame; the worker disagreed. The firm replied the worker had no responsibility to solicit new customers or follow-up on prospective leads; the worker noted he created mailing lists and guest logs. The worker responded that he was forced to resign.

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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.

A continuing relationship between the worker and the person or persons for whom the services are performed indicates that an employer-employee relationship exists. A continuing relationship may exist where work is performed in frequently recurring although irregular intervals.

If the work is performed on the premises of the person or persons for whom the services are performed, that factor suggests control over the worker, especially if the work could be done elsewhere. Work done off the premises of the person or persons receiving the services, such as at the office of the worker, indicates some freedom from control. However, this fact by itself does not mean that the worker is not an employee. The importance of this factor depends on the nature of the service involved and the extent to which an employer generally would require that employees perform such services on the employer's premises.

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.

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

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.

Please see [www.irs.gov](http://www.irs.gov) for more information including Publication 4341 Information Guide for Employers Filing Form 941 or Form 944 Frequently Asked Questions about the Reclassification of Workers as Employees and Publication 15 (Circular E) Employer's Tax Guide