

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

Occupation 02SAL Salespersons	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 firm is a wine merchant and negotiant. The worker was engaged to sell case goods. She received a 2017 Form 1099-MISC for her initial services; then when working full-time with more duties assigned, the firm issued a 2017 Form W-2. There was no written agreement.

Both the firm and the worker agreed that there was some initial training provided by the firm's manager. The worker did complete a certification in wine service and noted that she received training in administration organization as well. Both parties agreed that the firm's supervisors gave the worker her daily work/project assignments. Each party indicated that the other determined the methods by which the assignments were performed; but both agreed that the firm would be contacted if any problems or issues arose. Both agreed that the worker was to solicit customers by cold calling, contacting businesses and facilitating wine tasting demonstrations. Both parties provided leads. Only the worker noted that she reported to the firm's supervisor. The worker noted that she reported her personal car mileage, email updates and shared excel worksheet data; the firm mentioned that there were reports of products sold. Both agreed that her work schedule varied. The worker indicated that she worked random days for the whole day and that event hours varied from partial to full days. She worked at the firm's office and at different locations based on sales/travel/events. There were informal meetings. Both the firm and the worker agreed that the worker was required to provide the services personally. Only the firm hired any substitutes; the firm noted that the worker could hire and pay, then the firm would reimburse. Unclear if this actually occurred.

The firm provided the desk (on its premises) prior to the worker's treatment as an employee, then afterwards, a cellphone, computer and supplies. However, the worker noted that the firm provided the wine, administrative/sales materials, a vehicle, and event materials. The worker occasionally used her own personal vehicle and was reimbursed for her fuel expenses. The firm noted that the worker was paid per project and had no other economic risk. The worker noted that she was paid by the hour. The customer paid the firm. The firm carried workers' compensation insurance on the worker. Both agreed that the firm established the level of payment or services.

Both agreed that there were no benefits during the time that she was treated as an independent contractor. Either party could terminate the relationship without incurring a liability. The worker did not perform similar services for others; the firm disagreed. The relationship has ended.

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## Analysis

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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. The relationship of the worker and the business must be examined. 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 should be considered. 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.

Factors that illustrate whether there is a right to control how a worker performs a task include training and instructions. 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. The worker received initial training when engaged by the firm for the part-time sales position. 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. To further support this element of control, the worker was also required to provide her services personally. 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. Understandable, as she had received training. While the worker's services were performed on a part-time basis initially, those services were continuous. 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.

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. The worker received an hourly rate of pay for each 'project'/task and had no other economic risk. When she used her vehicle for traveling, the firm reimbursed her for fuel usage. 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.

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. There were no benefits and there was no written agreement. The worker was engaged on a part-time basis to sell wine and perform other assigned duties. When doing so, the worker was not engaged in an separate business venture. The fact that her services were part-time did not establish a business presence. 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.

Based on the above analysis, we conclude that the firm had the right to exercise direction and control over the worker for the entire work relationship 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 Publication 4341 for guidance and instructions for firm compliance.