

**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 worker submitted a request for a determination of worker status in regard to services performed for the firm from January 2017 to December 2018. The services performed by the worker included optical sales, i.e. dispensing and fitting optical glasses to adults and children, selling various types of lenses and frames, providing instruction to new contact lens wearers, answering the phone using a specific script, etc. The firm issued the worker Form 1099-MISC for 2017 and 2018. The worker filed Form SS-8 as she believes she erroneously received Form 1099-MISC.

The firm's response states its business is optical sales, i.e. eyeglasses and contact lenses. The worker was engaged as a commission-based sales associate. The worker was classified as an independent contractor as she had no set schedule and was paid commission. Services were performed under a signed independent contractor agreement.

The firm stated it provided the worker general policies and procedures of the business. As she had prior optical experience, specific training and instruction were not required. Work assignments consisted of generally being available daily to assist customers and to complete sales. The firm's general office policies determined the methods by which assignments were performed. The worker was empowered to solve problems. If unable to resolve, problems or complaints were escalated to the firm for resolution. Reports were not required. The worker set her work schedule. The firm required the worker to attend general meetings with contemporaries. There was no penalty if she was unable to attend. The firm required the worker to personally perform services. Hiring substitutes or helpers was not applicable. The worker stated written memos provided specific work instruction and assignments. Copies were provided for our review. The firm determined the methods by which assignments were performed and assumed responsibility for problem resolution. Reports included daily to-do lists; daily, weekly, and monthly pay reports; after appointment calls. She performed services on a regularly scheduled basis, i.e. Monday through Friday and every other Saturday. Services were primarily performed at the firm's office. The firm was responsible for hiring and paying substitutes or helpers.

The firm stated it provided all tools and collateral items. The worker did not lease equipment, space, or a facility. The worker did not incur expenses in the performance of services for the firm. Customers paid the firm. The firm paid the worker commission; it did not guarantee the worker a minimum amount of pay. The firm did not carry workers' compensation insurance on the worker. The worker incurring economic loss or financial risk was not applicable. The worker established the level of payment for the services provided or the products sold. The worker stated the firm provided all including a uniform, name tag, and time sheets to record daily in/out clock time. The firm established the level of payment for the services provided or the products sold.

The firm stated the work relationship could be terminated by either party without incurring liability or penalty. It is unknown if the worker performed similar services for others. The worker advertising was not applicable. The firm represented the worker as a representative to its customers. Services were performed under the firm's d/b/a. The work relationship ended when the worker quit/contract ended. The worker stated the firm provided the benefit of paid vacation and holidays. She did not perform similar services for others. There was no agreement prohibiting competition between the parties. The worker's image was on the firm's fliers and website; her voice on its telephone answering service. The firm represented her as an employee to its customers. She provided written notice to the firm to end the work relationship.

The independent contractor agreement, dated 1/1/18, states, in part, the worker was engaged to provide specific services, as needed, or such other such services as mutually agreed upon in writing by both parties. Services included optical sales, fittings, and adjustments; answering phones and scheduling appointments in accordance with the firm's policies; completing all necessary documentation related to optical sales; completing a morning, mid-day, and afternoon checklist for the department staffed. The worker would notify the firm of any changes to her schedule that could adversely affect her availability. The agreement could not be assigned by either party without the express consent of the other party.

The firm stated the worker was not responsible for soliciting new customers. She could solicit via word-of-mouth, if so inclined. Customers belong to the firm. Terms and conditions of sale were set by the firm's general guidelines for pricing. Products were sold in the firm's retail establishment. The worker stated she cold-called patients for annual exams and follow-up services. The firm provided leads to prospective customers. After hours calls were answered from her home. The firm required she follow its phone script and price listing.

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## Analysis

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.

Section 31.3121(d)-1(a)(3) of the regulations provides that if the relationship of an employer and employee exists, the designation or description of the parties as anything other than that of employer and employee is immaterial. Thus, if an employer-employee relationship exists, any contractual designation of the employee as a partner, coadventurer, agent, or independent contractor must be disregarded.

Therefore, the firm's statement that the worker was an independent contractor pursuant to a written 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. Furthermore, whether there is an employment relationship is a question of fact and not subject to negotiation between the parties.

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. In this case, the firm required the worker to personally perform services. Furthermore, the services performed by the worker were integral to the firm's business operation. The firm required the worker to perform services in accordance with its policies and procedures, which determined the methods by which work assignments were performed. The firm ultimately assumed responsibility for problem resolution. These facts evidence the firm retained the right to direct and control the worker to the extent necessary to ensure satisfactory job performance in a manner acceptable to the firm. Based on the worker's education, past work experience, and work ethic the firm may not have needed to frequently exercise its right to direct and control the worker; however, the facts evidence the firm retained the right to do so if needed.

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. In this case, the worker did not invest capital or assume business risks. The term "significant investment" does not include tools, instruments, and clothing commonly provided by employees in their trade; nor does it include education, experience, or training. As acknowledged by the firm, the worker did not incur economic loss or financial risk. Based on the commission rate of pay arrangement the worker could not realize a profit or incur a loss.

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 the firm's business. Both parties retained the right to terminate the work relationship at any time without incurring a liability. There is no evidence to suggest the worker performed similar services for others as an independent contractor or advertised business services to the general public during the term of this work relationship. The classification of a worker as an independent contractor should not be based primarily on the fact that a worker's services may be used on a temporary, part-time, or as-needed basis. As noted above, common law factors are considered when examining the worker classification issue.

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.

The firm can obtain additional information related to worker classification online at [www.irs.gov](http://www.irs.gov); Publication 4341.