

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

Occupation 03INS Installers	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 laborer installing tile in tax year 2017, for which he received Form 1099-MISC. The firm's business is described as a tile installation business. In a follow up phone call the worker stated he worked for the firm until the latter part of tax year 2018.

The firm's response was signed by the owner. The firm's business is construction: remodeling of bathrooms and kitchens; and, the worker provided services as a helper, general laborer, at his convenience/schedule until November 2018. In a telephone conversation the firm stated the worker had the option of going to and signing up through an agency and having taxes withheld or being paid on a 1099-MISC through the firm.

The worker indicated he was given specific on-the-job training and instructions on how to set tile; however, the firm responded that there was no specific training and instructions given. Both parties concur that the job assignments were given orally from the firm's owner, 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. The worker's services were rendered 8 a.m. to 5 p.m. Monday through Friday; he stated the firm tracked his hours. The worker stated he was required to perform the services personally; and, any additional personnel were hired and paid by the firm. The firm responded the worker was not required to provide the services personally.

The firm and worker acknowledged the firm provided all tools. The worker did not lease equipment, space, or a facility. The worker stated he was paid an hourly wage; the firm stated the worker was paid based on when he showed up, the job, and what was done. Both parties agree the customers paid the firm. The worker was not covered under the firm's workers' compensation insurance policy. The worker stated he was not at risk for a financial loss in this work relationship and that he did not establish level of payment for services provided or products sold. However, the firm stated he was not at risk for a financial loss in this work relationship unless the worker damaged equipment or personal property. The firm stated that the worker did establish level of payment for his services.

The firm and worker agreed that no benefits were 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 and he was not required to obtain the firm's approval. The worker stated he was not providing same or similar services to others. The worker indicated he wore the firm's shirt.

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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.

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.

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.

The fact that the person or persons for whom the services are performed furnish significant tools, materials, and other equipment tends to show the existence of an employer-employee relationship.

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

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.