

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

Occupation Construction/Technical Services/Trades	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 is seeking a determination of worker classification for services performed as a tile installer for the firm from July 2018 until November 2018. The worker received a 1099-MISC from the firm for 2018. The worker feels that they were misclassified as an independent contractor because they were given a uniform by the firm and told to represent themselves as part of the firm to customers.

The firm states that it provides construction and remodeling services on residential homes. The worker was a licensed independent contractor that the firm hired to install tile in residential homes. The firm states that the worker was an independent contractor because they provided their own tools for the job and they were free to provide services to other firms. There were no written agreements between the parties. The firm provided a copy of a W-9 and state licensing board website information on the worker.

The firm states that they did not provide the worker with any training as they were a licensed professional. The firm's project manager gave the worker instruction on job tasks. The worker received job assignments when the firm had a project and inquired about the worker's availability. The firm states that California trade codes for licensed contractors determined the methods used by the worker to complete tasks. If the worker encountered any problems or complaints while working, they were required to contact the firm's office for problem resolution. If there was a problem with the tile installation, the worker was expected to correct the issue. There were no reports applicable to the job situation. The worker would decide their own hours and inform the firm's project manager of their hours. All jobs were performed at customer residences. There were no meetings applicable to the job situation. The worker was required to provide services personally. The firm was responsible for hiring and paying all helpers needed. The worker states that the firm would provide the worker with an excerpt of the contract between the firm and clients, as well as verbal instructions from the firm on how to fulfill the contract. The worker received job assignments through calls and texts from the firm's office. The firm determined the methods used to complete job assignments and assumed responsibility for problem resolution. The worker would provide pictures along with text explanations to the firm upon job completion detailing what work was performed. The worker's daily routine was from 8am until 5pm, commencing when they would meet at each job site. All jobs were performed at customer locations. The worker was required to attend weekly team meetings over the phone on a Friday. If the worker did not attend these meetings, they would be let go. The worker was required to perform services personally and could not hire anyone. The firm hired and paid all helpers needed.

The firm states that they provided the worker with raw materials, and the worker provided their own work truck and the equipment needed for their job duties. The worker did not have to lease anything and incurred no expenses. If minor materials were needed, the firm would reimburse the worker upon turning in receipts. The firm paid the worker an hourly wage with no access to a drawing account for advances. Customers paid the firm for services provided. The firm did not carry worker's compensation insurance on the worker. The firm states that the worker faced the usual financial risks of a licensed contractor. The worker did not establish the level of payment for services provided. The worker states that the firm provided all supplies, materials, and property. Some tools and equipment were also provided by the firm. The worker provided tools and a tile saw. The worker did not incur any expenses and the firm reimbursed the worker for some materials expenses. The firm paid the worker hourly, and the worker faced the potential financial risk of their tools getting stolen. The firm established the level of payment for services provided.

The firm states that there were no benefits offered to the worker. The relationship between the parties could be terminated by either party without liability or penalty. The firm states that the worker did perform similar services for other firms during the work relationship. The worker did not need approval from the firm to do so. There were no non-compete agreements in place between the parties. The worker was not a member of a union and was listed on the California State License Board website as an independent contractor. The firm states that on their website, they state that they use both employees and sub-contractors to complete work performed. The firm encouraged both types of worker to wear a company shirt while on projects. The work relationship ended when the worker moved before some tile installation project issues could be addressed. The worker states that they did not provide similar services for other firms during the work relationship. The worker states that they did not advertise their services to the public. The worker states that they were represented by the firm as an employee and was given a uniform by the firm. The work relationship ended when the worker quit and moved.

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## Analysis

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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, co-adventurer, agent, or independent contractor must be disregarded.

Therefore, a statement that a worker is an independent contractor pursuant to a written or verbal 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 of tile installation. The firm provided work assignments by virtue of the customers served, required the worker to report on services performed upon job completion, and 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.

Payment by the hour, day, 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. 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. Based on the hourly 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. The worker was required to represent the firm while working by wearing a provided uniform bearing the firm's name. 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.