

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

Occupation 03PVW Construction, Trade, and Technical Services	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 July 2016 to January 2017 as an executive administrative assistant. The work done by the worker included property photography and videos, uploading pictures to the MLS and firm's website, creation of marketing fliers and presentation folders, creating procedures for processing consistency, etc. The worker also performed services as a transaction coordinator. As the worker did not have any prior real estate experience, the firm helped her learn the business and reviewed her work. The firm issued the worker Form 1099-MISC for the years in question. The worker filed Form SS-8 as she believes she erroneously received Form 1099-MISC for the income earned in connection with administrative services performed beginning July 2016. The worker does not dispute the non-employee compensation that she earned in connection with photography and video services provided to the firm prior to July 2016. The worker believes she was an employee as she did not provide similar services to others. There was no written agreement between the parties.

The firm's response states it is a real estate broker business. The worker was initially engaged as an independent contractor for photography services and she was paid a fee per house photographed. As noted above, the income earned in connection with these services is not disputed by the worker. The firm then paid the worker a flat fee per month regardless of the number of houses photographed. The worker also performed services as a transaction coordinator, which she was paid a fee per file processed. Photography services were performed under the worker's established business and checks were issued to the worker's business. The worker used her own camera, laptop, etc. Services were performed at property locations, at the worker's home, and sometimes at a shared space. The worker continued to provide services to others while engaged by the firm. It is noted the Forms 1099-MISC were issued under the worker's name and Social Security number and not under a business name or tax identification number.

The firm stated it did not provide specific training or instruction to the worker. The firm provided work assignments. The worker determined the methods by which assignments were performed. The firm was contacted if problems or complaints arose. The firm was responsible for resolution. Reports and meetings were not required. The worker had no daily routine as she came and went as she pleased. Services were performed at property locations, in the worker's home office, and in a shared space provided by the firm. The firm did not require the worker to personally perform services. The worker was responsible for hiring and paying substitutes or helpers. The worker stated the firm provided her specific training and instruction. The firm determined the methods by which assignments were performed. The worker's daily routine consisted of Monday through Friday, 9 am to 5 pm, with some Saturdays required. The worker provided administrative support, answered phones and emails, and created/implemented processes and procedures. 85% of the worker's time was spent at the firm's office; 15% at the worker's home. The firm required the worker to attend a weekly team meeting. The firm required the worker to personally perform services. The firm was responsible for hiring and paying substitutes or helpers.

The firm stated it did not provide supplies, equipment, or materials. The worker provided and incurred the unreimbursed expense associated with her camera, laptop, etc. The worker did not lease equipment, space, or a facility. Customers paid the firm. The firm paid the worker a flat fee per month. The worker was not allowed a drawing account for advances. The firm did not carry workers compensation insurance on the worker. The worker's economic loss or financial risk related to loss or damage of her equipment. The worker established the level of payment for the services provided. The worker stated the firm provided office space, desk, printer, office supplies, email account, and Internet. The worker provided her laptop and camera. The worker did not incur expenses in the performance of services for the firm. The firm paid the worker salary. The firm established the level of payment for services provided.

The firm stated benefits were not made available to the worker. The work relationship could be terminated without penalty. The worker did perform similar services for others; the firm's approval was not required for her to do so. There was no agreement prohibiting competition between the parties. The worker advertised on various websites. The firm represented the worker as a photographer to its customers. The worker voluntarily terminated the business relationship. The worker stated the benefit of personal days was made available to her. She did not perform similar services

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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, 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.

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 various services performed by the worker were integral to the firm's business operation. The firm provided work assignments 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.

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. 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 the worker likely uses her camera and laptop for personal needs, they are not considered a significant investment. Based on the fixed monthly 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. 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 for the period in question, 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.