

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

Occupation 03TEC 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**

It is our usual practice in cases of this type to solicit information from both parties involved. Upon the submission of the Form SS-8 from the firm, we requested information from workers concerning this work relationship. Three (3) workers responded to our request for completion of Form SS-8.

From the information provided the firm is a toy media website who reviews, films, and analyzes toys for the consumer. The firm states the workers obtain the jobs with them through word of mouth at toy shows. The firm states they filed the Form SS-8 because they believe the toy reviewer is an independent job role with them. The firm states they have three (3) reviewers on staff who are treated as employees as they do other work as well as being a reviewer. Since these in-house reviewers could not handle all of the reviews needed to be done, they engage others to do reviews. The firm states the workers/reviewers come to their office, select a product, and then film and write up their review. The number of workers/reviewers vary on staff during the year and the workers/reviewers work as much or as little as they want. Much of the work is done on the workers/reviewer's own computer and they are paid upon upload of their videos to the firm's website. The firm states they average five (5) reviewers per month and most have other jobs (moms, actors, PR workers, etc.). The firm has no written agreements with the workers/toy reviewers.

The firm states they go to toy fairs & baby shows and moms, dads, etc. express their desire to try out toys and do reviews. The firm states they contact these prospective workers/reviewers and the workers/reviewers are screened by coming into the firm's premises and doing a three (3) min video/review to see if they are video worthy. If the prospective workers/reviewers are accepted by the firm to be reviewers, the workers perform services per diem. The workers/reviewers put themselves on the on-line calendar on the days, hours they want to come into the firm's premises. If workers/reviewers cannot make the times/days they signed up for, there are no repercussions for this. Workers/reviewers are paid once their video goes on the firm's website.

The firm states initially the workers/reviewers are given log-on credentials and writing instructions and there is sort of a checklist of what should be covered when the video is being filmed and reviews are being written. The firm states for training purposes, they suggest the workers/reviewers watch the videos of other reviewers who are more experienced to how they review toys, etc. The firm states their assembly team reviews the videos performed by the workers/reviewers and if changes need to be made, the workers/reviewers will need to change the review, and then redo the video. The firm states the workers/reviewers are required to personally perform their services and their services are performed 25% of the time in the firm's office and 75% of the time off of the firm's premises. The workers/reviewers are required to notify/email the firm's content director if any problems or complaints arise for the director's resolution. The workers have no set schedule and some take summers and holiday time off. The workers are not required to submit reports to the firm or attend meetings.

The firm provides the toys and video team and the firm states the workers provide the script. The workers incur expenses for travel and internet service which the firm does not reimburse. The workers are paid on a piece work basis and the firm states the workers do not have an opportunity to incur a loss as a result of their services. The content director establishes the level of payment for the services provided. The firm does not withhold employment taxes from the workers/reviewers pay.

The workers are not eligible for employee benefits. The workers do not perform similar services for others but some are also bloggers. The workers do not advertise their services and there is no non-compete agreement between the parties. Either party could terminate the work relationship at any time without either party incurring a liability. The firm states the work relationship ends when the workers are paid for all work (videos) completed.

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## Analysis

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As in this case and 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.

Evidence of control generally falls into three categories: behavioral control, financial control, and relationship of the parties, which are collectively referred to as the categories of evidence. In weighing the evidence, careful consideration has been given to the factors outlined below.

Factors that illustrate whether there is a right to control how a worker performs a task include training and instructions. In this case, the workers are given log-on credentials and writing instructions when they begin performing services for the firm. The firm states that the workers' videos are reviewed after they are recorded and if changes are needed to be done, the workers are required to re-do the video. There is also specific topics or items that need to be covered in each video. The workers provide their services on behalf of and under the firm's business name rather than an entity of their own. The firm is responsible for the quality of the work performed by the workers. This gives the firm the right to direct and control the workers and their services in order to protect their financial investment, their business reputation, and their relationship with their clients. These factors indicate the firm retains behavioral control over the workers/reviewers.

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.

Lack of significant investment by a person in facilities or equipment used in performing services for another indicates dependence on the employer and, accordingly, the existence of an employer-employee relationship. 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. Special scrutiny is required with respect to certain types of facilities, such as home offices. In this case, the firm provided the products to review, they provide video equipment and a space in which to shoot the videos, they also provided a space to write the reviews if the workers/reviewers so chose to use. These factors indicate financial control over the workers/reviewers.

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 workers/reviewers are not engaged in an independent enterprise, but rather the services performed by the workers are a necessary and integral part of the firm's business. All parties retain the right to terminate the work relationship at any time without incurring a liability.

The firm's statement that the workers perform services on an as-needed basis and therefore, independent contractors is without merit as both employees (seasonal) and independent contractors can perform services when the needs of a business warrants.

A continuing relationship was established rather than a one-time transaction taking place. A continuing relationship may exist where work is performed in frequently recurring although irregular intervals. The existence of a continuing relationship indicates an employer/employee relationship was established.

Based on the above analysis, we conclude that the firm has the right to exercise direction and control over the workers to the degree necessary to establish that the workers are common law employees, and not independent contractors operating a trade or business.