

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

Occupation 03TRA Tradespersons	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**

Information provided indicated the firm rents luxury apartments, with a restaurant soon to be opened in the building. The worker performed construction services for the renovation during tax year 2016 and 2017. The firm reported the income on Form 1099-MISC for both tax years. The firm indicated the worker actively advertised himself as a construction specialist to their firm and other construction project owners. He had his own tools and was paid per project. The firm indicated there was an oral agreement he would be engaged for specific jobs/project, would be paid per hour and not eligible for overtime. The firm indicated no training was given, he was already experienced. The firm's project manager hired him for specific construction projects. He would have contacted that project manager or the general manager for any issues. The firm indicated the worker determined his own hours. Once given a project he could do it any method he chose. He only worked on the [REDACTED] building project. The firm indicated the worker would hire and pay any helpers. The firm provided the concrete mix, project, wood and other construction materials. He provided his tools and safety glasses. The firm stated he was paid by the hour and on piece work on a monthly basis. The customer (renters) paid the firm. No benefits were provided. Either party could terminate the work relationship without incurring a penalty or liability. The firm stated he had a relationship with many construction project owners in the area. He was represented as a construction contractor to everyone. The job completed.

The worker indicated he was a general laborer for the firm. He had a set schedule seven am to four pm. He clocked in and out each work day. All instructions were given by the firm's employees. All work was performed on the firm business location. He was required to perform services personally. The worker indicated the firm hired and paid all workers. He agreed no additional benefits were given. He was paid by the hour. The firm provided all equipment, materials and supplies. The firm did carry workers compensation insurance. The worker agreed either party could terminate the work relationship without incurring a penalty or liability. He did not perform similar services for others. The worker indicated he was represented as an employee. He indicated he was laid off.

**ANALYSIS**

The question of whether an individual is an independent contractor or an employee is one that is determined through consideration of the facts of a particular case along with the application of law and regulations for worker classification issues, known as "common law." Common law flows chiefly from court decisions and is a major part of the justice system of the United States. Under the common law, the treatment of a worker as an independent contractor or an employee originates from the legal definitions developed in the law and it depends on the payer's right to direct and control the worker in the performance of his or her duties. Section 3121(d)(2) of the Code provides that the term "employee" means any individual defined as an employee by using the usual common law rules.

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.

In determining whether an individual is an employee or an independent contractor under the common law, all evidence of both control and lack of control or independence must be considered. We must examine the relationship of the worker and the business. We consider facts that show a right to direct or control how the worker performs the specific tasks for which he or she is hired, who controls the financial aspects of the worker's activities, and how the parties perceive their relationship. The degree of importance of each factor varies depending on the occupation and the context in which the services are performed. Therefore, your statement that the worker was an independent contractor pursuant to an 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.

-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. If the person or persons retain the right to control the order or sequence of the work, this is sufficient to indicate an employer-employee relationship.  
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## Analysis

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-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. 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.

-Payment by the hour, week, or month generally points to an employer-employee relationship.

We have applied the above law to the information submitted. As is the case 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, you retained the right to change the worker's methods and to direct the worker to the extent necessary to protect your financial investment.

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.

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 your business. Both parties retained the right to terminate the work relationship at any time without incurring a liability.

## 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. There was no indication the worker submitted bids for the projects indicated by the firm. No evidence was found, nor provided by the firm, to substantiate the worker owned his own business. The firm directed the projects to be performed, provided all materials and equipment (other than tools of the trade provided by the worker), and paid the worker by the hour for the work performed. Factors that indicated no opportunity for profit or loss on behalf of the worker. The worker indicated he was required to clock in and clock out each work day, indicating control over the work schedule.