

**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**

The worker initiated the request for a determination of his work status as a stucco applicator and plasterer in tax year 2017. The firm's business is described as stuccoing of exteriors of commercial and residential buildings and interior and exterior plastering systems.

The firm's response was signed by the president. The firm's business is described as stucco and plastering work for various contracting firms. The worker performed services installing stucco. The firm indicated the worker was paid starting on May 2015 through August 2017 and there were no differences between the services.

According to the firm, the worker was not given specific training and instructions. The job assignments were based the worker's availability; and, it was the worker that determined the methods by which the worker's services were performed. The worker was required to contact the firm if any problems or complaints arose that needed to be resolved. The worker's services were rendered at different locations according to his schedule. The worker was required to perform the services personally; any additional personnel were hired by the worker.

The worker responded that he was given specific training and instructions as to what to do, what materials to use, and where to start and when to stop. The worker received his job assignments from his supervisor. The firm determined the methods by which the worker's services were performed. He agreed that any problems or complaints that he encountered were directed to his supervisor or the firm's owner for resolution. He indicated his services were rendered from 9 am to 4 or 5pm at the customer's location. The worker stated that he was not required to perform the services personally; any additional personnel were hired and paid by the firm.

The firm's response indicates the firm provided supplies and materials and the worker furnished tools and equipment. The worker did not lease equipment, space, or a facility; but, he did incur expenses for his own tools and equipment needed to complete the job. The worker was paid an hourly wage; the customers paid the firm. The firm acknowledged that the worker was covered under the firm's workers' compensation insurance policy, that the worker was not at risk for a financial loss in this work relationship, and that the firm established level of payment/the hourly rate of pay for services provided.

The worker stated the firm provided all supplies, equipment, and materials; and, that he furnished nothing. He did not lease equipment, space or a facility and did not incur expenses in the performance of the job. He concurred with the firm that he was paid an hourly wage, that the customers paid the firm, and that he was covered under the firm's workers' compensation insurance policy. He responded that he was not at risk for a financial loss in this work relationship and that the firm established level of payment for services provided.

Both parties agreed that there were no benefits 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; the worker disagreed. The firm responded the worker was represented as a contract laborer and performed services under the firm's name.

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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.

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.

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.

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.

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.

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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.