

**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**

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 worker, we requested information from the payer concerning this work relationship. The payer responded to our request for completion of Form SS-8.

From the information provided the payer is a trust and estate set up to settle the decedent's estate. The worker was engaged in 2015 and 2016 as a laborer to move dirt and clean the payer's property. The payer believes the worker was an independent contractor as he had no supervision and he provided the services requested. The payer reported the worker's earnings on Forms 1099-MISC.

The payer states they provided no training or instructions to the worker and the worker received verbal assignments with the determining how he would perform his services. The worker was required to personally perform his services at the payer's farm. The worker was required to submit his hours worked and areas worked on to the payer. The worker's routine varied and the payer states the worker had no daily routine showing up at his convenience. The worker was not required to attend meetings.

It is unknown to the payer who provided the heavy equipment, supplies, and materials in order for the worker to perform his services. The worker was compensated at an hourly rate and he did not have a significant investment, therefore, he did not have an opportunity to incur a loss as a result of his services.

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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 worker was experienced in this line of work and did not require training or detailed instructions from the payer. The need to direct and control a worker and his services should not be confused with the right to direct and control. Even when an entity allows a worker considerable latitude in performing his services, the retention of the right to give instructions or directions, without exercising that right, is enough to make the worker an employee. In many instances, this retention is indicated by the requirement that the worker provide the entity with frequent reports of a project he is working on. An experienced worker is free and is expected to exercise his or her own judgment and initiative as to the operation or running of a project and is many times hired due to their experience and knowledge. We believe the payer alone had the right to determine what projects the worker would work on and they retained the right to issue general instructions as to the means to be used to reach those objectives.

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.

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.

In the construction or excavating business it requires capital for heavy equipment, supplies, licensing, insurance, and other items. However, we did not see where this took place in this case. There was no evidence presented or found in this investigation that the worker was in the business of providing heavy equipment services with his own heavy equipment to the public out of his own home or a facility set up for this purpose. No business license or business registration in the state where he performed services was found. The worker, therefore, the worker did not have a significant investment and he did not have an opportunity to incur a loss or realize a profit as a result of his services. "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.

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

Based on the above analysis, we conclude that the payer 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.