

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

Occupation 03TRA Service Technician	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 service technician in tax years 2014 through 2017. In 2016 he was issued Form W-2 and Form 1099-MISC; he stated he was a full time employee and received the same salary every week and there were no differences in the work performed. He performed siding, roofing, and some small plumbing jobs such as hot water tank installation, faucets, and toilets. Occasionally others worked with him, depending on the size of the job. The worker stated he drove the company truck, was insured by the company, carried a company phone, and did the same work every day. The firm's business is described as general construction, heating and plumbing; the firm was performing work for home improvement retailers and individuals.

The firm's response was signed by the Controller. The firm's business is described as residential plumbing/HVAC services. The worker worked on the firm's contracts with retail home improvement companies; the worker did general construction work.

The worker indicated he received specific training and instructions to obtain lead certification. All job assignments came from the firm's owner; the worker was provided with services orders and email access for jobs. The firm determined the methods by which the worker's services were performed; any problems or complaints encountered by the worker were directed to the firm's owner or the firm's owner's daughter for resolution. The worker's services were rendered at customer locations and firm's premises. The worker was required to perform the services personally; any additional personnel were hired and paid by the firm.

The firm responded the worker ran the retail home improvement exteriors contracts. The contract leads came via cell phone. The firm indicated the worker determined the methods by which the worker's services were performed. Any problems or complaints encountered by the worker were directed to the home improvement retailer for resolution. The firm stated the worker received leads directly to the provided cell phone and he called and scheduled customers from his home. The worker's services were rendered 30% from the worker's home; 65% at customer location, and the remainder at the firm's location. The worker was required to perform the services personally; substitutes/helpers had to be approved by home improvement retailer, but were paid by the firm.

The worker stated the firm provided a truck, all materials, most tools, gas, uniform (hat and shirt), and the equipment. The worker indicated he furnished some tools, he did not lease equipment, space, or a facility, and did not incur expenses in the performance of the job. The worker was paid a salary; customers paid the firm. The worker indicated he was covered under the firm's workers' compensation insurance policy. The worker responded he was not at risk for a financial loss in this work relationship; and, it was the firm that established the level of payment for services provided.

The firm acknowledged the worker was provided with a cellphone and vehicle; and, the worker furnished tools and equipment. The materials for the job were furnished by the retail home improvement company. The worker did not lease equipment, space, or a facility and did not incur expenses in the performance of the job. The firm paid the worker a salary. The customers paid the retail home improvement company. The worker was covered under the firm's workers' compensation insurance policy. The firm indicated the worker was at risk for a financial loss in this work relationship due to loss or damage of tools and equipment. The firm stated the worker established level of payment for services provided or products sold.

The worker indicated that there were no benefits extended to the him; he was paid a weekly salary regardless of days off. Either party could terminate the work relationship without incurring a liability or penalty. The worker was not performing same or similar services for others during the same time frame. The worker handed out the firm's business cards and wore the firm's hat and shirt. The firm provided the worker with leads and he performed estimates. The worker stated he collected payment for services and gave the invoice with firm's name and address. All sales had to be approved by firm. The worker noted that he never carried his own insurance or drove his own vehicle for jobs performed on behalf of the firm.

The firm concurred that no benefits were made available to the worker. Either party could terminate the work relationship without incurring a liability or penalty. The firm was not sure if the worker was performing same or similar services for others during the same time frame. The firm indicated the worker was represented as a retail home improvement worker. The worker had no responsibility to solicit new customers.

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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.

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.

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.

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. Also, if the firm has the right to control the equipment, it is unlikely the worker had an investment in facilities.

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.

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.