

**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 carpenter doing painting and handyman tasks in tax year 2017. The firm's business is described as a residential remodeling.

The firm's response was signed by the firm's president. The firm's business is a building contractor. The worker provided services of carpentry, drywall, and painting. The firm stated the worker was an independent contractor as agreed to before the worker started; he was to work independently, and invoice for completed work.

The firm and worker acknowledged that the worker was given instructions as to how complete the job, as needed. The job assignments were given verbally, as needed. The firm and worker did not concur as to which party determined the methods by which the worker's services were performed. The worker indicated that any problems or complaints encountered were directed to the firm for resolution; the firm responded that the worker handled any issues that would arise with advice from the firm for resolution. The worker stated his services were rendered 8 am to 4:30 pm at the customer's location. The firm stated that the worker would work his own schedule to complete the work. The firm and worker agree that the worker was required to perform the services personally; the worker indicated any additional personnel were hired and paid by the firm, with the firm responding that no helpers or substitutes were needed.

The firm and worker agreed the firm provided lumber, drywall, and paint; the worker furnished the tools. The worker did not lease equipment, space, or a facility. According to the firm the worker incurred expenses for transportation and tool repairs; the worker disagreed. The firm paid the worker an hourly wage; the customers paid the firm. The firm did acknowledge 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 for loss or damage to tools and equipment. The firm responded the worker established the level of payment for services provided or products sold; an offer was made for the worker's acceptance. The worker stated the firm established level of payment for services provided.

There were no benefits extended to the worker. Either party could terminate the work relationship without incurring a liability or penalty. The firm replied that the worker was performing same or similar services for others during the same time frame and that the worker did word-of-mouth advertising; the worker did not agree. The firm stated the worker was identified to customers as a contractor for the firm; the worker responded that services were rendered under the firm's business name.

The firm and worker submitted copies of generic invoices to the firm for hours worked and supplies that were purchased and reimbursed, as well as, a copy of the 2017 Form 1099-MISC.

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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.

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. 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.

The firm's 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.

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.