

# 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 submitted a request for a determination of worker status in regard to services performed for the firm from July 2016 to February 2018 as a glazier. The work done by the worker included cutting various materials, glass shower installation, window and screen repair, board ups, commercial store front and door installations and service, etc. The firm issued the worker Form 1099-MISC for 2016 and 2017; Form W-2 for 2018. The worker filed Form SS-8 as he believes he erroneously received Form 1099-MISC.

The firm's response states it is a retail glass shop. The work done by the worker included measuring, glazing, and subbing. The worker was classified as an independent contractor as he performed work needed per job.

The firm stated it did not provide the worker specific training or instruction. The firm provided work assignments. The firm and worker determined the methods by which assignments were performed. The firm was contacted and assumed responsibility if problems or complaints arose. Reports and meetings were not required. The worker's routine consisted of different hours if work was available. Services were performed at customer locations. The firm required the worker to personally perform services. Hiring and paying substitutes or helpers was not applicable. The worker stated the firm provided him on-the-job training related to cutting, installation, and repairs. The firm determined the methods by which assignments were performed. Written reports were not required. He provided the firm verbal reports on work performed. His routine typically consisted of Monday through Friday, 8 am to 4 pm. 50% of his time was spent at the firm's shop and 50% spent at customer locations. The firm occasionally called meetings. The firm was responsible for hiring and paying substitutes or helpers.

The firm stated it provided supplies, equipment, materials, and property. The worker provided supplies, equipment, and property. The worker did not lease equipment, space, or a facility. The firm reimbursed the worker for tools and equipment expenses. The worker incurred the unreimbursed expenses associated with his vehicle, fuel, and tolls. Customers paid the firm. The firm paid the worker weekly or bi-weekly. A drawing account for advances was not allowed. The firm did not carry workers' compensation insurance on the worker. The worker incurring economic loss or financial risk was not applicable. The worker established the level of payment for the services provided. The worker stated the firm also provided work shirts which advertised the firm's business. He purchased some hand tools as he was told they would be tax deductible. The firm reimbursed him for most tolls. The firm paid him an hourly rate of pay. The firm established the level of payment for the services provided, in addition to setting the price for products and services sold.

Benefits were not made available to the worker. The work relationship could be terminated by either party without incurring liability or penalty. The firm stated the worker performed similar services for others; the firm's approval was not required for him to do so. There was no agreement prohibiting competition between the parties. The worker did not advertise. The firm represented the worker as a contractor to its customers. Services were performed under the firm's business name. The work relationship ended when the job was completed and due to lack of work. The worker stated he did not perform similar services for others. The firm paid for advertising and he was sometimes featured in the firm's advertising. The firm represented him as an employee to its customers. The firm terminated his services after being questioned about the worker classification issue.

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## Analysis

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.

Section 31.3121(d)-1(a)(3) of the regulations provides that if the relationship of an employer and employee exists, the designation or description of the parties as anything other than that of employer and employee is immaterial. Thus, if an employer-employee relationship exists, any contractual designation of the employee as a partner, coadventurer, agent, or independent contractor must be disregarded.

Therefore, a statement that a worker is an independent contractor pursuant to a written or verbal 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. Furthermore, whether there is an employment relationship is a question of fact and not subject to negotiation between the parties.

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. In this case, the firm required the worker to personally perform services. Furthermore, the services performed by the worker were integral to the firm's business operation. The firm provided work assignments, ultimately determined the methods by which assignments were performed, and assumed responsibility for problem resolution. These facts evidence the firm retained the right to direct and control the worker to the extent necessary to ensure satisfactory job performance in a manner acceptable to the firm. Based on the worker's past work experience and work ethic the firm may not have needed to frequently exercise its right to direct and control the worker; however, the facts evidence the firm retained the right to do so if needed.

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. In this case, the worker did not invest capital or assume business risks. 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. As acknowledged by the firm, the worker did not incur economic loss or financial risk. Based on the weekly, bi-weekly, or hourly rate of pay arrangement the worker could not realize a profit or incur a 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, but rather the services performed by the worker were a necessary and integral part of the firm's business. Both parties retained the right to terminate the work relationship at any time without incurring a liability. There is no evidence to suggest the worker performed similar services for others as an independent contractor or advertised business services to the general public during the term of this work relationship. The classification of a worker as an independent contractor should not be based primarily on the fact that a worker's services may be used on a temporary, part-time, or as-needed basis. As noted above, common law factors are considered when examining the worker classification issue.

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 for the entire work relationship, and not an independent contractor operating a trade or business.

The firm can obtain additional information related to worker classification online at [www.irs.gov](http://www.irs.gov); Publication 4341.