

# 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 June 2018 to January 2019. The services performed included prepping, priming, and painting cabinetry and furniture at the firm's warehouse and clients' homes. The worker filed Form SS-8 as she never received a Form 1099-MISC or Form W-2 from the firm.

The firm's response states it's a furniture and cabinetry restoration business. In addition to furniture and cabinetry restoration, the worker also performed posting on social media, clerical work, and data entry. The worker was classified as an independent contractor because work was assigned based on her availability. Compensation was based on the work assigned. She also completed similar work for herself outside of the firm. Based on a verbal agreement the worker would be paid on a weekly basis.

The firm stated it provided training on the different types of paints and primers. The firm explained how to perform data entry. The firm determined the methods by which assignments were performed based on the preference of the client. The firm was contacted directly if problems or complaints arose. Reports were not required. The worker performed services on an as-available basis. The worker performed services between the firm's shop and client location. The firm required her to personally perform services. The firm was responsible for hiring and paying substitutes or helpers. The worker stated the firm provided instruction on how to properly prep, prime, paint, spray cabinets and furniture. The worker received work assignments through phone calls and text messages. Reports included hours worked each week. Meetings were in the morning to gather supplies and go over the days plan.

The firm stated it provided all materials, equipment, supplies, and property. The worker provided safety items. The worker did not lease equipment, space, or a facility. The worker incurred the unreimbursed expense of travel to and from the work sites and the firm's shop. Customers paid the firm. The firm paid the worker a piece work rate of pay; a drawing account for advances was not allowed. The firm did not carry workers' compensation insurance on the worker. The worker did not incur economic loss or financial risk. The worker established the level of payment for the services provided. The worker stated she incurred the expense of supplies and materials when needed. The firm reimbursed for all expenses. The firm paid the her an hourly rate of pay. The firm established the level of payment for the services provided.

The firm stated the work relationship could be terminated by either party without incurring liability or penalty. The worker performed similar services for others and the firm didn't require approval. The worker did not advertise. If the worker assembled or processed a product at home, the firm provided the materials. Finished products were given to the client that ordered the job. 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 worker became busy with other work and stopped services. The worker stated she did not perform similar services for others. There was no agreement prohibiting competition between the parties. The firm represented her as a employee to its customers.

The worker stated she was not responsible for soliciting new customers. The firm determined her territory.

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## Analysis

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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, the firm's statement that the worker was an independent contractor pursuant to a 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.

Training a worker by requiring an experienced employee to work with the worker, by corresponding with the worker, by requiring the worker to attend meetings, or by using other methods, indicates that the person or persons for whom the services are performed want the services performed in a particular method or manner. This is true even if the training was only given once at the beginning of the work relationship. In this case, the firm trained the worker. Furthermore, the services performed by the worker were integral to the firm's business operation. The firm provided work assignments by virtue of the customers served 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 education, 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 piece work 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, 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.