

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

Occupation 04FSC Foremen/Superintendents/Crew or Peer Leaders	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 job superintendent managing the daily activities on a commercial construction site in tax years 2017 and 2018, for which he received Form 1099MISC. He received training, was provided with an iPad, the firm paid all costs, and made all decisions, for which the worker was paid a salary. The firm's business is described as a commercial construction company.

The firm's response was signed by the general manager. The firm's business is general contracting; and, the worker provided services as a superintendent that inspected and monitored quality at the job site.

The worker indicated he was given training and instructions for software certifications, job site management processes, company trainings and meetings. The job assignments were delivered from the project manager through email and weekly meetings. 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 for resolution. Daily reports as well as expense reports were required by the firm. The worker's services were rendered Monday through Friday from 8 am to 5 pm. The worker was required to perform the services personally; any additional personnel were hired and paid by the firm.

The firm responded that no specific trainings and/or instructions were give. The firm provided the worker with the construction schedule and contacts for the subcontractors; however, the worker set his own schedule and the methods by which he performed his job. Any problems or complaints encountered by the worker were directed to the project manager, the project owner, the architect, and the engineers for resolution. The worker's services were rendered at the worker's office and the job site with no fixed schedule. The worker was required to perform the services personally.

The worker stated the firm provided him with an iPad, tools, all heavy equipment, and supplies. The worker furnished no materials, equipment or supplies. The firm reimbursed him for gas, tools, oil, offices supplies, mileage, water/ice, and occasional materials from Home Depot. The worker did not lease equipment, space, or a facility. The worker indicated he was paid a salary. The customers paid the firm. He was not covered under the firm's workers' compensation insurance policy. The worker stated he was not at risk for a financial loss in this work relationship unless he messed up and was fired. The worker did not establish level of payment for services provided.

The firm acknowledged providing the heavy equipment, approved plans, construction permits, project schedule, and the sub's contacts. The worker furnished his own tools, computer, supplies, mobile phone, and transportation. It was unknown to the firm as to any other expenses the worker may have incurred. The worker did not lease equipment, space, or a facility. The worker was paid a negotiated price per project, as a lump sum on a semi-monthly basis. The customers paid the firm. The worker was not covered under the firm's workers' compensation insurance policy. It was unknown to the firm whether the worker was/not at risk for a financial loss in this work relationship whether he established the level of payment for services provided or products sold.

Both parties concur the there were no benefits extended to the worker and that either party could terminate the work relationship without incurring a liability or penalty. The firm indicated the worker was performing same or similar services for others during the same time frame; the worker disagreed. The worker was fired.

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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.

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.

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

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.

Please see [www.irs.gov](http://www.irs.gov) for more information including Publication 4341 Information Guide for Employers Filing Form 941 or Form 944 Frequently Asked Questions about the Reclassification of Workers as Employees and Publication 15 (Circular E) Employer's Tax Guide.