

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

Occupation Managers/Supervisors/Administrators	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 firm states that the worker had prior experience as a real estate agent and did not receive any specialized training from the firm. The worker generated their own sales leads in addition to receiving sales leads from the firm. The worker determined how to pursue the sales leads. The worker could refuse or accept any assignments from the firm's broker. The firm's broker was responsible by law for ensuring compliance of real estate transactions and records. The worker provided these records to the firm in the form of sales reports, listings, and sales contractors. The worker determined their own hours. The firm states that the worker performed services at both the firm's premises and at various locations as determined by worker. The worker attended weekly sales meetings and there was no penalty for not attending. The worker was required to perform services personally as they were a license real estate agent. Helpers and substitutes were not applicable. The worker states that they received training from the firm and a former employee of the firm. The worker states that they reported directly to the firm's owner and supervisor and received assignments from the firm owner. The worker was required to perform services at the office during specific hours of the day despite the independent contractor agreement. The firm determined the methods by which jobs were done and assumed responsibility for problems encountered on the job. The worker was required to provide the firm with weekly prospecting and call volume reports at the weekly sales meetings. The worker states that they were required to perform services from 8am until 5pm Monday through Friday at the firm's office. The worker was also required to provide the firm with vacation and personal leave requests for approval prior to taking leave. The worker performed services at the firm's premises and was required to attend weekly sales meetings and monthly strategic planning meetings. The worker was required to perform services personally. Helpers and substitutes were hired and paid by the firm's owner.

The firm states that they provided the worker with a laptop, business cards, copier, stationary, and office supplies. The firm is unaware of anything the worker provided and the worker did not lease any space, facilities, or equipment. The firm was unaware of any expenses the worker incurred while performing services. The firm reimbursed the worker for MLS fees and DPOR continuing education fees that were required by law for the worker to do. The worker was paid on a commission basis with an annual base salary paid on a biweekly basis. The firm provided copies of checks issued by the firm showing commissions earned throughout the years in question. Customers of the firm paid the firm for services provided. The firm did not carry worker's compensation insurance on the worker. The worker contractually indemnified the firm against any loss resulting from the any negligent or intentional acts or omissions on behalf of the worker. The firm states that the commission rates the worker earned were an industry-standard and were therefore not set by either party. The worker states that the firm provided a computer, computer monitor, pens, paper, desk, and a chair. The worker provided their own car and fuel. The worker states that the firm reimbursed the worker for all job-related expenses. The worker states that they earned a base salary and commission related to any sales projects sourced by the worker. The worker states that the firm owner established the level of payment for services provided.

The firm states that they did not offer the worker any benefits. The relationship between the parties could be terminated by either party without liability or penalty. The firm was unaware if the worker provided services for other firms during the work relationship. There was a non-complete clause in the agreement between the parties. The worker was not a member of a union and did not advertise their services to the public. The worker was represented by the firm as a real estate agent performing services under the firm's name. The worker quit, thus ending the relationship between the parties. The worker was responsible for soliciting their own sales leads. The firm's supervising broker determined the worker's territory for sales. The worker states that the firm provided the worker with paid vacations, sick pay, paid holidays, personal days, and bonuses. The firm sued the worker for breach of contract regarding the new job duties despite the worker stating they never assumed their new role. The independent contractor contract between the parties states that the worker was not allowed to work for any other firm performing similar duties without the firm's approval, thus showing a control over the worker's earnings capability. The worker states that they did not perform similar services for other firms. The worker advertised on business cards, websites, online real estate listings, association memberships, and at employer sponsored events. The worker states that they were represented by the firm as an employee of the firm and an assistant of the firm's owner. The worker resigned due to misclassification of worker status and abuse.

---

## 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, co-adventurer, 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 of real estate sales. The firm required the worker to report on services performed through sales reports and weekly meetings, 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.

Payment by the hour, day, 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. 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. Based on the base salary pay arrangement in addition to commission earnings, 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 agreement between the parties states that the worker was required to seek written approval from the firm before providing services to other firms. 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.

The worker did not fit qualifications of a statutory non-employee due to the majority of their remuneration being tied to a base salary.

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.

For reference, please see previous court case of *Sylvia GOLDEN v. A.P. ORLEANS, INC.* Civ. A. No. 87-0264. Feb. 29, 1988.

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