

# SS-8 Determination—Determination for Public Inspection

Occupation 05FIW Restaurant Worker	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 part-time work status as a pizza delivery driver as well as food preparation, cashier, and cleaning tasks (machines, tables, restrooms) in tax years 2016 and 2017. The firm's business is described as dine-in and delivery pizza. The worker provided copies of Form 1099-MISC for both years.

The firm and worker agreed that no specific training or instructions were given to the worker. According to the firm, job assignments came from the 'food expeditor' who called out 'delivery' and the drivers decided who wanted to take the delivery. The firm stated the drivers determined the methods by which the worker's services were performed. Any problem or complaint pertaining to a delivery was handled by the worker. Problems related to quality were directed to and addressed by the firm. The delivery services were rendered based on worker's availability.

The worker indicated that the job assignments came from the manager, owner, or a customer. The firm determined the methods by which the worker's services were performed and handled any problems or complaints encountered by the worker. The worker stated that services were rendered 90% of the time on the firm's premises and the remainder of the time doing deliveries. He stated the shifts were generally five to eleven hours with no breaks and he was required to clean the premises before leaving. The worker was required to perform the services personally; any additional personnel were hired and paid by the firm.

Both parties concur that the firm provided all equipment, materials, and property, and the boxed/bagged product. The worker furnished his vehicle; the worker did not lease equipment and did not incur expenses in the performance of the job other than the vehicle, vehicle maintenance, gas, and insurance. The firm gave him gas money and paid him an hourly wage; the customers paid the firm. The worker could keep the tips. The worker was not covered under the firm's workers' compensation insurance policy. The worker was not at risk for a financial loss in this work relationship unless he had car problems or a car accident; the firm established level of payment for services provided or products sold.

Both parties acknowledged that no benefits were extended to the worker. Either party could terminate the work relationship without incurring a liability or penalty. The worker was not performing same or similar services for others during the same time frame. The worker was a driver performing services under the firm's name.

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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.

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.

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.

Your 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.