

# SS-8 Determination—Determination for Public Inspection

Occupation 05FIW.18 Food Industry 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 firm is a sole proprietor operating a bar/lounge. The firm engaged the worker as a bartender. There was no written agreement between the two parties.

The worker was trained on the cash register and where to find the supplies. The worker's schedule was set according to the firm's needs. The firm determined how the assignments should be performed. The worker relied upon the firm to resolve problems and complaints. The worker had a set schedule. The worker performed her services at the firm's location. The worker was required to perform the services personally.

The firm provided the location, supplies and equipment the worker needed to perform her services. Either party could terminate the relationship without incurring a liability. The worker was paid on an hourly basis. The customers paid the firm directly. The firm established the level of payment for the services provided.

The worker received no benefits. Either party could terminate the relationship without incurring a liability. The worker did perform similar services for others at the same time she performed services for the firm. The worker stated she was represented as an employee and the firm stated the worker was represented as their bartender. The worker terminated her services.

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. See, for example, Rev. Rul. 68-598, 1968-2 C.B. 464, and Rev. Rul. 66-381, 1966-2 C.B. 449.

The establishment of set hours of work by the person or persons for whom the services are performed is a factor indicating control. If the nature of the occupation makes fixed hours impractical, a requirement that workers be on the job at certain times is an element of control. See Rev. Rul. 73-591, 1973-2 C.B. 337.

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. See Rev. Rul. 74-389, 1974-2 C.B. 330.

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. See Rev. Rul. 70-309, 1970-1 C.B. 199. "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.

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.

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**Analysis**

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The worker was an employee according to common law. The information provided by both parties showed the worker was trained by the firm. The worker's schedule was set by the firm's needs which showed control over the worker. The fact the worker was required to perform her services personally showed the firm was interested in the methods used as well as the end result as an employer. The firm had the financial investment as the firm provided the location, equipment and supplies the worker needed to perform her services. Financial control was also demonstrated by the firm paying the worker on an hourly rate of pay. It was the firm that could suffer a significant loss since the firm set the prices to charge the customers and then the firm was responsible to collect the amount charged. The worker performed bartender services at the firm's bar/lounge which demonstrated the worker's services were integrated into the firm's daily operations.

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.

Please go to [www.irs.gov](http://www.irs.gov) for further information.

Firm: Publication 4341

Worker: Notice 989