

# SS-8 Determination—Determination for Public Inspection

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| Occupation<br>07SWO Public Services/Security, & Safety | Determination:<br><input checked="" type="checkbox"/> Employee <input type="checkbox"/> Contractor  |
| UILC   | Third Party Communication:<br><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 security guard in tax years 2015 through 2017. The firm's business is described as an auto dealership.

The firm's response was signed by a human resources/payroll representative. The firm' described its business as an auto dealership and the worker performed services as security/driver. The worker drove around the company properties and reported any security concerns to the company's lead security person and/or law enforcement.

According to the firm, there were no specific trainings and instructions given. The job assignments came from the lead security person; and, it was the lead security person that determined the methods by which the worker's services were performed. Any problems or complaints encountered by the worker were directed to the firm's lead security person and/or law enforcement for resolution. The worker's services were rendered at night when the business was closed. The worker was required to perform the services personally.

The worker indicated that he was given specific training and instructions from the firm to drive around to check the five lots and keep an hourly report. The firm scheduled the work assignments; and, it was the firm that 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. His routine consisted of getting a gas card, fill the vehicle provided by the firm, and drive around checking their five lots, keeping an hourly report. The worker stated he was required to perform the services personally; any additional personnel were hired and paid by the firm.

The worker responded that the firm provided the schedule, a car, gas, and paperwork. He indicated that he provided nothing, he did not lease equipment, and he did not incur expenses in the performance of the job. The firm paid him an hourly wage. The worker was not covered under the firm's workers' compensation insurance policy. He indicated he was at risk for a financial loss in this work relationship should he have a car accident while driving during his shift. The firm established the level of payment for services provided or products sold.

The firm concurred that the worker was provided an automobile to drive around the firm's properties and that the firm paid the worker an hourly wage. It was not known to the firm as to what the worker provided, whether he leased equipment, or incurred expenses in the performance of the job.

Both parties acknowledged that no benefits were extended to the worker during this time and that either party could terminate the work relationship without incurring a liability or penalty. The worker indicated he was not performing same or similar services for others during the same time frame. There was no agreement other than the worker being paid \$XX/hour and once a week on Friday.

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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.

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.

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.

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.

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 property. 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.