

# SS-8 Determination—Determination for Public Inspection

Occupation 02OFF Office Workers	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 submitted a request for a determination of worker status in regard to services performed for the firm from February 2018 to August 2018 as an office assistant. The work done by the worker included performing administrative tasks for the firm. The firm issued the worker Form 1099-MISC for the period in question. The worker filed Form SS-8 as she believes she erroneously received Form 1099-MISC.

The firm's response states its business is the sales of promotional products. The work done by the worker included customer management and product drop off and pickup to/from vendors. Services were performed under a verbal agreement. The worker was classified as an independent contractor as she controlled the hours, days, and work load. As a college student, the worker needed flexibility.

The firm stated it trained the worker on its customers and products. The firm provided work assignments and assumed responsibility for resolution if problems or complaints arose. The worker determined the methods by which assignments were performed. Reports and meetings were not required. The worker's routine, i.e. services performed and schedule, varied based on her school schedule. On average she worked 24-hours per week. Services were performed at one location. The firm did not require the worker to personally perform services. The firm ultimately hired and paid substitutes or helpers. The worker stated the firm trained her on all aspects needed for the position. The firm determined the methods by which assignments were performed. Her daily routine consisted of 9 am to 5 pm, Monday through Friday. Services were performed at the firm's premises. The firm required her to attend monthly meetings and to personally perform services.

The firm stated it provided a phone and computer. The worker provided her vehicle. The worker did not lease equipment, space, or a facility. The worker incurred the unreimbursed expense associated with fuel. Customers paid the firm. The firm paid the worker an hourly rate of pay; a drawing account for advances was not allowed. The firm did not carry workers' compensation insurance on the worker. The worker's economic loss or financial risk related to equipment damage and customer solicitation. The firm established the level of payment for the services provided and the products sold. The worker stated the firm also provided printers, fax machines, office supplies, etc. She did not incur expenses in the performance of services for the firm and she did not incur economic loss or financial risk.

The firm stated the work relationship could be terminated by either party without incurring liability or penalty. The worker performed similar services for others; the firm's approval was not required for her to do so. There was no agreement prohibiting competition between the parties. The worker advertised on a social media platform. The firm represented the worker as a representative to its customers. The work relationship ended when the worker verbally terminated the work relationship. The worker stated she did not perform similar services for others or advertise. The firm represented her as an employee to its customers. Services were performed under the firm's business name.

---

## 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, coadventurer, agent, or independent contractor must be disregarded.

Therefore, the firm's statement that the worker was an independent contractor pursuant to a 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.

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. In this case, the firm trained the worker in connection with services performed. Furthermore, the services performed by the worker were integral to the firm's business operation. The firm provided work assignments 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, 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. As the worker likely used her vehicle for personal needs, it is not considered a significant business investment. Based on the hourly rate of pay arrangement 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 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.

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.

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