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**Employment Tax Procedures:
Classification of Workers
Within the
Limousine Industry**

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I. INTRODUCTION

The purpose of these guidelines is to enable examiners to make accurate and consistent determinations of employee/independent contractor status in the limousine industry (the "Industry").¹ For purposes of these guidelines, the term "limousine" includes sedans, vans and stretch limousines used in a livery service, but does not include any vehicles licensed by any jurisdiction as a "taxi" or "taxicab." Taxicabs are generally authorized by this license to pick up customers any time and anywhere within the licensing agency's jurisdiction, without prearrangement. Limousines, as a matter of local law, generally are limited to picking up passengers only by prearrangement.

There is substantial evidence that audits in the Industry consume considerable taxpayer and Service resources and sometimes result in substantial liabilities for companies that made good faith, but erroneous, efforts to classify drivers. While there is a procedure for obtaining a classification ruling from the Service using Form SS-8, there are many instances where it is impractical to obtain such a ruling. More importantly, the use of a Form SS-8 ruling is inefficient in resolving issues that

¹ A description of the Industry is found in section II below.

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recur on a frequent basis.

In order for examiners to make accurate and consistent determinations of employee/independent contractor status, the Service is looking more closely at different types of market segments to understand how they operate. In this way, the facts that best demonstrate whether the requisite right to control is present can be identified. Identification of these facts will give the Industry a better understanding of the tax law and, consequently, enhance its ability to comply with the relevant legal standards.

Limousine companies comprise a diverse group. Since the mid-1980s, the Service has been auditing companies to determine whether their drivers are employees or independent contractors; as a result, the Service and the Industry have been frequently at odds. Because of the wide organizational variation in how limousine services are delivered, it has often been difficult for both the Service and the Industry to agree upon determinations of driver status. In addition, state and local laws, regulations, and practices vary widely, further complicating the determination process.

This analysis does not provide this industry, or any industry, special treatment or tax advantages. The analysis does not eliminate or alter the legal standard of the "right to direct and control." It is intended only to identify those facts that are clearly more relevant than others in determining control in a

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specific market segment.

However, in the event a taxpayer in the Industry does not agree with an examiner's determination made in accordance with these guidelines, the examiner will need to collect and analyze all relevant facts. This is needed in order to ensure that the examiner's file contains all the relevant data that may be necessary in order to respond to the taxpayer's challenge of the determination.

In addition to the worker classification issue addressed by these guidelines, there is an additional compliance issue concerning the reporting by companies to the Service of payments made to workers. A company that treats a driver as an employee is required to report the wages on Form W-2. A company that treats a driver as an independent contractor is required to report payments (if they equal or exceed \$600 in a year) on Form 1099. While these reporting requirements are analytically separate from the worker classification issue, an examiner should confirm that payments have been reported for all drivers, even if they have been misclassified.

II. DESCRIPTION OF THE INDUSTRY

The limousine industry provides two distinct services:

- 1) the dispatch service, which links the client to the car; and,
- 2) the transport service, which delivers the client to the destination. These two services give rise to three service-delivery models: the pure dispatch service provider; the pure

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transport provider; and the mixed or typical service provider. These guidelines cover all three service-delivery models. However, as a practical matter, limousine companies generally offer both dispatch and transport service and classification issues most frequently arise in these mixed or typical service provider models.

A. OVERVIEW OF DISPATCH SERVICE PROVIDERS.

Dispatch service providers neither own nor lease vehicles. The primary business purpose of these companies is to provide a dispatch service to limousine drivers. Few companies in the limousine industry offer pure dispatch service; where they do exist they are located in major metropolitan areas.

Dispatch companies concern themselves with "when and where" the driver serves the passenger; they do not concern themselves with controlling "how" the driver provides the service. The characteristics of the pure dispatch company include:

- o A dispatch company does not own vehicles;
- o The dispatch company makes or loses money based on operation of the communications system, not operation of the vehicle;
- o A dispatch company dispatches calls for transport among a group of unrelated limousine drivers, either companies or individuals;
- o If one driver refuses the job (which they are free to do), the dispatcher calls the next driver on the list; and,
- o The driver is not accountable to the dispatch company.

Because pure dispatch companies do not have the right to control the drivers, application of these guidelines will often show that

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the drivers associated with limousine companies are properly classified as independent contractors.

A number of contracts used in the industry state that the firm provides only dispatch services to drivers. However, services provided by a company are to be determined in accordance with the facts. Contract language between the "dispatch" company and the driver is not determinative. Despite the contract statement that only dispatch services are provided, the contract itself, an ancillary agreement, or company policy may contain additional provisions governing "how" the chauffeur-driven vehicles are to be used in providing the transport service.

Where the company has the right to control the "how" of the transport function, it is not a pure dispatch company. Indeed, few companies in fact can accurately be classified as pure dispatch companies. A pure dispatch company is completely divorced from the transport function. Pure dispatch companies are identifiable by their actual operation, policies and procedures.

B. OVERVIEW OF THE PURE TRANSPORT BUSINESS.

Pure transport service providers own vehicles. The primary business of these companies is to provide chauffeured vehicles for hire to the public. Although these companies own dispatch equipment, their dispatch service merely supports their transport service.

The profit and loss potential of a transport company depends

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upon the operation of its vehicles. For that reason, a transport business closely controls "how" the transport service is provided. The characteristics of the pure transport business include:

- o The company owns its vehicles;
- o The profitability of the company depends on how it operates the transport function, not the dispatch service;
- o The company hires drivers under employment contracts;
- o The company provides detailed instructions to its drivers and monitors their daily performance; and,
- o The drivers are accountable to the company.

Because pure transport companies require the right to control the drivers, application of these guidelines will often show that the drivers associated with transport companies are properly classified as employees.

C. TYPICAL INDUSTRY SERVICE PROVIDER.

Most limousine companies fall into the mixed or typical industry service provider model. If the pure dispatch and pure transport models are at the ends of the spectrum, the typical service provider fills the middle. This is the gray area in the classification process.

In contrast to the pure dispatch and pure transport models, in a typical service provider model it is not clear who is providing the services. In the usual disputed case, the Service maintains that the limousine company operates a business for which the driver merely provides the driving, while the Industry

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maintains that both the company and the driver have independent businesses. The disagreement often arises because the activities of the company and the activities of the drivers overlap and blend together. For example:

Do drivers have a significant investment?

- o The company may own the central telephone/radio system, but the drivers own their own car phones/radios.
- o The company may own the vehicles, but the drivers lease the cars.

Do drivers have an opportunity for profit and loss?

- o The company may provide fuel for the cars, but the drivers stock the vehicles with drinks, magazines, and other courtesy supplies.
- o The company may require drivers to be available in the evenings, but the drivers can refuse jobs offered to them during the day.

Are drivers subject to instructions?

- o The company may require the use of drivers' logs and payment records, but the drivers maintain their own business records.

Do drivers make their services available to the public?

- o The company may advertise in the Yellow Pages, but the drivers hand out their own business cards;

Do drivers render services personally?

- o The company may prohibit the use of outside drivers, but the drivers may substitute other drivers if they also work for the company.

As the lines delineating the responsibilities, activities, and rights of the company and the drivers blur, so do the lines delineating the right to control.

In a typical service model the company and the driver may

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attempt to resolve the "right to control" issue through contract language. For example, the parties may enter into one or more agreements stating that the driver is an independent contractor or the company provides only dispatch services. These agreements may take a variety of forms: driver contracts, leases, revenue sharing agreements, and so forth. The terms of the written agreements may or may not be consistent with one another. They may be influenced by company policies (formal or informal), regulations, and practices. In the end, driver classification will be determined by all of the facts and circumstances, including but not limited to the language of the written agreements.

III. THE COMMON LAW STANDARD

The determination of whether a worker is an employee or independent contractor is fundamental to the administration of the federal tax laws.² The classification of a worker determines whether the worker is subject to the Federal Insurance

² Under the Small-Business Job Protection Act (H.R. 3448), the Service will undertake the determination of worker status only after it is determined that the business does not qualify for relief under Section 530 of the Revenue Act of 1978. Section 530 provides businesses with relief from federal employment tax obligations if certain requirements are met. In cases involving whether a business has the employment tax obligations of an employer, the Service will, under amended section 530(e)(3), first determine whether a business meets the requirements for relief under section 530 before resolving the classification issue. A discussion of section 530 is beyond the scope of these guidelines. See generally, Chapter 1, Employee or Independent Contractor: Does Section 530 Apply?, Training 3320-102 (October 1996).

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Contributions Act ("FICA") and income tax withholdings, whether the employer is subject to Federal Unemployment Tax Act ("FUTA") obligations, whether the worker is subject to limitations on the deductibility of employee business expenses, and the treatment of the worker for purposes of qualified retirement plans or other fringe benefits. For FICA, FUTA and income tax withholding purposes, the term "employee" includes any individual who, under the usual common law rules applicable in determining the employer/employee relationship, has the status of an employee. Internal Revenue Code sections 3121(d), 3306(i) and 3401(c).

Under the common law rules, the key question is whether a business has the right to direct and control a worker as to the details of when, where, and how work is to be performed. If so, the worker is an employee. If, instead, the business merely specifies the result to be achieved, the worker will be an independent contractor.³ Because the right to direct and control can be manifested in many ways, the Service has developed

³ The common law test, as set forth in regulations, looks at whether a business has:

the right to control and direct the individual who performs the services, not only as to the result to be accomplished by the work but also as to the details and means by which that result is accomplished. That is, an employee is subject to the will and control of the employer not only as to what shall be done but as to how it shall be done. In this connection, it is not necessary that the employer actually direct or control the manner in which the services are performed; it is sufficient if [the employer] has the right to do so.

Employment Tax Reg. § 31.3121(d)-1(c)(2).

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training materials that discuss facts suggesting either independent contractor or employee status.⁴

Attempts to apply the common law standard often lead to results that both the Service and taxpayers characterize as unclear, subjective, or inaccurate. In many cases, these results occur because some of the facts relevant in one industry or type of work do not apply to the specific industry or type of work being considered. For example, if an employer provides workers training in the services they will perform, the employer usually wants the services to be performed in a particular manner. This fact is usually not relevant in the limousine industry because most drivers will have received sufficient training in their primary duty, driving, before they seek employment with a limousine company.

IV. GENERAL GUIDELINES FOR DETERMINING WORKER STATUS IN THE INDUSTRY

One of the goals of the Compliance 2000 approach is to promote efficiency. To meet this goal, the Service tried to identify "critical factors" for determining whether a driver within the Industry is properly classified as an employee or an

⁴ See Chapter 2, "Employee or Independent Contractor," Training 3320-102 (October 1996). The Service and the Social Security Administration previously developed a list of twenty common law factors as a training aid. These factors, which were later published in Rev. Rul. 87-41, 1987-1 C.B. 296, were not intended as a substitute for the common law standard. Instead, they were simply a checklist or aid that could be used in applying the common law standard. Thus, there was no requirement that all twenty factors be "passed" in order to establish independent contractor status.

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independent contractor. Two critical factors were identified: 1) significant investment; and, 2) realization of profit or loss. The absence of either critical factor indicates that a driver is an employee and no further analysis is necessary. If both critical factors are present, the driver may be an employee or an independent contractor, and the analysis must proceed to a second level of "significant factors." The significant factors consist of factors which generally differentiate between employees and independent contractors. A third group of factors, which bear the least weight, have been deemed to be generally less significant or not applicable to the determination of driver status in this Industry.

A. SUMMARY OF ANALYSIS.

The analytic steps can be summarized in the following manner.

1. Determine whether the driver meets the two Critical Factors (Significant Investment and Realization of Profit or Loss) discussed in Section IV A. If either Critical Factor is absent, the driver will be an employee. If both Critical Factors are present, the driver may be either an employee or an independent contractor. The analysis then proceeds to the next step.

2. Determine whether it is the driver or the company which maintains control by analyzing the Significant Factors (Instructions, Making Services Available to the Public, Rendering

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Services Personally). Classification of a driver is made by balancing the control factors inherent in the Significant Factors. If a driver meets one of the three significant factors, the driver will be classified as an independent contractor.

3. If a determination cannot be made from examination of critical and significant factors, reference may be made to the non-significant factors to the extent they have not already been considered. A detailed flowchart outlining this process is contained in Appendix A.

B. CRITICAL FACTORS.

As noted, there are two critical factors that must be analyzed before a limousine driver can be classified. Under the common law standard, these factors alone do not establish the degree of control necessary to treat a driver as an employee. However, in practice, one or both of these factors is absent in situations where the limousine driver is an employee.

1. Significant investment. Investment by a person in facilities used in performing service for another is a fact which tends to establish independent contractor status. A lack of investment tends to indicate dependence on the employer for such facilities and the existence of an employer and employee relationship. In the context of the limousine industry, this factor is interpreted to extend beyond physical facilities, so as to include major investments in the vehicle and insurance.

Significant investment is a key factor in the classification

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of limousine drivers. A driver's investment in a limousine or sedan may be substantial. The purchase of a vehicle generally involves a major capital outlay in the industry. The driver's investment in a limousine or sedan is considered in determining whether the driver has made a significant investment in the business.

It is common industry practice for limousine drivers to either own or lease their vehicles. The limousine driver's ownership of the vehicle constitutes a substantial investment in equipment and is an indication of independent contractor status. Ownership must be bona fide. This often entails examining whether a purported loan or lease actually constitutes a bona fide lease for tax purposes.⁵

In general, the substance of a transaction, not its legal form, controls federal tax consequences. Helvering v. Lazarus & Co., 308 U.S. 252 (1939). A bona fide owner of the limousine holds "the burdens and benefits of ownership."⁶ The fact that the driver has legal title to the vehicle (with a properly filed lien if an outstanding liability exists) and registers it in the driver's name does not alone determine ownership. To be considered owner of the vehicle, the driver must also have an

⁵ The following analysis on bona fide loans and leases is limited solely to the determination of whether a loan or lease is bona fide for purposes of these guidelines and not for other tax purposes.

⁶ Larsen v. Commissioner, 89 T.C. 1129, 1267 (1987).

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equity investment, physical possession of the vehicle, responsibility for property taxes, risk of loss, and opportunity for profit.

If the limousine company or a related entity provided the financing for the limousine driver to purchase the vehicle, the terms of the financing arrangement must not undercut the substantial nature of the driver's investment. The parties must have intended to create a loan with an obligation to repay and they must treat the transaction as a loan for book purposes and tax purposes. Any financing arrangement must include a market rate of interest, customary security provisions, a standard amortization schedule over a reasonable period, and other terms comparable to those found in loans available from third parties not related to either the driver or the limousine company. The examiner must consider the loan in light of the facts, circumstances and overall relationship between the parties. The arrangement of the parties needs to be documented by a note or other evidence of indebtedness. In addition, the driver must have the right to use the vehicle for any lawful purpose and not be restricted to using the vehicle to drive for a particular company. Finally, the company must treat all drivers who independently finance vehicles exactly the same as drivers who finance vehicles through the limousine company or related entity. Treating limousine drivers equally includes sharing the same percentage of gross revenue and treating them the same concerning

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each of the critical and significant factors identified in these guidelines.

The loan agreement also must be consistent with the other agreements between the driver and the company, such as driving contracts and leases. These agreements must be examined to determine the bona fides of the loan. For example, the loan documents cannot permit the company to terminate or "call" the loan if the driver terminates its association with the company:

EXAMPLE:

Driver purchases a sedan from the XYZ Dealership. He finances the purchase with a loan from ABC Limousine Company ("ABC"). The loan agreement provides for a five year term with payments of principal and interest at fair market rates. The agreement mirrors commercial loans in every respect except that the loan may be terminated at the will of ABC. Historically whenever a driver terminates the driving relationship with ABC, the Company declares the driver's loan in default and requires immediate payment of all outstanding balances. These defaults are declared regardless of the driver's credit worthiness or solvency after termination. Under these circumstances, the loan is not bona fide and the driver does not have a significant investment in the sedan.

The examiner will look to the true substance of the transaction: is there substance to the loan, is there genuine indebtedness, is there an actual, non-circular, flow of funds, is there a business purpose to the arrangement? If after a thorough consideration of the transaction, the examiner determines that the ownership is bona fide then the driver will have a significant investment in the vehicle.

If the limousine driver holds the vehicle under a bona fide, arm's-length lease, this constitutes a substantial investment in

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equipment. The lease must be bona fide.

When the driver claims to have a significant investment in the vehicle based on a lease with the Company, the examiner will scrutinize the transaction carefully to determine the true substance of the agreement. Many of the same facts considered in the loan analysis are relevant to the leasing analysis. For purposes of evaluating terms in a lease, the following facts will be scrutinized.

1. The limousine driver pays a periodic, fixed rental fee at fair rental value, which may be established by demonstrating that it is comparable to rental fees charged by independent lessors for limousines of similar type and quality. For example, local car rental rates from auto dealerships or car rental agencies are available for vans or sedans in most areas. If no comparable is available, then a reasonable market rate of return, inclusive of the cost of insurance if borne by the limousine company (lessor), will be used.

2. The terms of the lease besides the amount and schedule of payments are similar to the terms of leases offered by independent lessors for limousines of similar type and quality. Again, local car rental terms used by auto dealerships or car rental agencies are a good source for comparison. Such terms include insurance and maintenance requirements, options to purchase the limousine, warranties or disclaimers, restrictions on use of the limousine, default provisions, and rights of inspection by the lessor.

3. The limousine driver has the right to use the leased vehicle for any lawful purpose and is not restricted to using the vehicle to drive for a particular company.

4. The lease does not provide for termination of the lease upon the termination of the limousine driver's association with the limousine company. If the lease provides for termination at will or upon a change in circumstances, further examination will be required to determine whether it is the lessor's practice to terminate the lease upon the termination of the limousine driver's association with the company.

5. The limousine driver has unrestricted dominion and control of the limousine during the term of the lease.

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6. The lease is in writing and has a duration of at least one six hour shift, five days a week for one year.

7. The company treats all limousine drivers who lease vehicles exactly the same as limousine drivers who own vehicles. Treating limousine drivers equally includes sharing the same percentage of gross revenue and treating them the same with respect to each of the critical and significant factors identified in these guidelines.

All of these facts will be weighed, although the presence of both of the first two facts above (lease payment and lease terms) strongly indicates that the lease is bona fide and arm's length. As with the loan arrangement, the form of the transaction as a lease does not determine whether or not the lease is bona fide. The examiner must consider the lease terms in light of the facts, circumstances and overall relationship between the parties.

Finally, the examiner must review all ancillary contracts, riders, and other side agreements and interview both the company and its drivers with respect to those agreements. Many limousine companies use multiple agreements, which may or may not be consistent. If the documents are consistent, this supports a finding that the lease should be respected. If the documents are inconsistent, further analysis is needed. Occasionally, the terms of an apparently bona fide lease are so drastically altered by another agreement that the lease is devoid of economic substance and should be disregarded.

EXAMPLE 1:

Driver leases a limousine from ABC Company under an agreement that provides a fixed term and a periodic, fixed rental fee at fair rental value. The amount and schedule of payments are similar to the terms of leases offered by

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independent lessors for limousines of similar type and quality. ABC Company is not in the general leasing business and only leases limousines to drivers who enter into exclusive driving contracts with it. The lease is a bona fide lease.

EXAMPLE 2:

The facts are the same as in Example 1 except that under the terms of the driving contract, Driver is also prohibited from using the limousine for personal purposes and must have the automobile serviced and maintained at a facility designated by ABC Company. The terms of the driving contract substantially reduce the Driver's dominion and control over the vehicle during the lease period and, accordingly, detract from the bona-fides of the lease.

It also is important to note that these guidelines require fixed rental fees. Where drivers' "lease payments" are based on a percentage of the fares they collect, the Service has determined that such receipt sharing agreement diminishes the likelihood of a true lessor-lessee relationship. Rev. Rul. 71-572, 1971-2 C.B. 347.

Clearly a significant investment in the vehicle or lease must be carefully considered in the classification determination. In analyzing whether a driver has a significant investment in the vehicle, the initial inquiry is simple: does the driver own or lease the limousine? If the answer is no, the driver is an employee.⁷ The next inquiry is: is the driver's ownership claim

⁷ In applying these guidelines, examiners sometimes must determine the identity of the true employer or worker. For example, companies offering "employee leasing" exist in some limousine markets. Here a separate company hires drivers and leases them out as chauffeurs. The "employee leasing" company treats the drivers as employees, intending to relieve the limousine company from employment tax and workers' compensation obligations. In such a situation, the examiner must determine

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or lease bona fide? If the answer is no, the driver is an employee. If the answer is yes, the analysis must continue to the second critical factor.⁸

2. Realization of Profit or Loss. An employee has no opportunity for a profit or loss because he or she is paid for services rendered on a time basis. An independent contractor, on the other hand, controls the variables which can result in a profit or a loss. This is the second critical factor and is to be evaluated after it is determined that the driver owns or leases the vehicle.

The opportunity for a driver to realize profit or loss must be distinguished from simply generating receipts to compensate the driver for driving. The opportunity to realize profit or loss means that the driver is using his capital investment to generate gross receipts. To realize profit or loss, the driver employs capital, markets services, controls expenses, and makes business decisions. The driver can use the vehicle for any lawful purpose and is free to promote the business. The driver must be able to develop and exercise business judgment to earn

which party is the employer. In contrast, the identity of the worker must be examined where the driver is incorporated. Some limousine companies require their drivers to incorporate so that they are making payments to corporations and not individuals. The examiner must determine if the corporation should be recognized for tax purposes. Determination of the true employer or worker in these cases is beyond the scope of these guidelines.

⁸ Although a driver's investment in the vehicle, through purchase or a lease, is not per se determinative, it is weighted heavily in the context of the driver's profit and loss potential.

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profits and limit losses.

An opportunity to realize profit or loss means that the driver will suffer true financial loss when expenses exceed receipts.⁹ Aside from vehicle financing and lease payments discussed above, common expenses in the industry that the driver may control include:

- o Insurance. State insurance regulations typically require that the owner of the vehicle carry insurance. Companies may require that drivers maintain a specified amount of coverage and pay a pro rata share of the company's umbrella insurance policy.
- o Maintenance and Repairs. Drivers may incur maintenance and repair costs at a facility of their choice or the company may have a its own repair facility which the driver is required to use.
- o Fuel, uniforms and incidentals. Drivers may or may not pay for these items but, relative to other expenses in the industry, these tend to be minor. Certainly the risk that a driver quits before making enough money to cover the cost of the uniform (or other insignificant costs) is not a risk of loss.

In addition to these expenses, drivers may make investments in licenses and franchise rights.

In evaluating the driver's liabilities, it is important to review all of the driver's written agreements with the limousine company, lessors, lenders, insurers, and suppliers. Revenue sharing agreements should receive particular attention. If most

⁹ Avis Rent A Car System, Inc. v. United States, 503 F.2d 423 (2d Cir. 1974). It is also noteworthy that in this case, the Second Circuit identified seven factors that it deemed relevant to worker classification. With one exception, the factors it cited were basically the same as were selected by the Service as critical and significant.

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local drivers receive a commission of 40 percent, and the company under examination pays its drivers 60 percent the percentage should be questioned. The "excess" commission could be reimbursement to the drivers for their "business expenses." The reality of the arrangement controls, not the wording of the contracts. The driver must have a true business risk that is independent of the limousine company's risks and is significant in relationship to the risks inherent in the overall transport function.

There is no bright line for determining whether or not this factor will count toward or against independent contractor classification. The factor must be reviewed on the basis of the agreements drafted by the parties and the facts and circumstances of each claimed business. If it is determined that the driver has no opportunity for a profit or loss, the driver is an employee. If it is determined that the driver has a significant investment in the vehicle and can realize a profit or loss, the three significant factors must be considered.

C. SIGNIFICANT FACTORS.

Where a driver has a significant investment in the vehicle and can realize a profit or loss, the analysis proceeds to the consideration of three "significant factors." The issue at this juncture is who has the right to control.¹⁰

¹⁰ It is the right to control that is important, whether or not it is actually exercised. Employment Tax Reg. § 31.3121(d)-1(c)(2).

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Based upon discussions with the Industry, it is believed that in most instances an analysis of the following three significant factors will establish who has the right to control and thereby distinguish between employees and independent contractors. None of these factors standing alone is determinative of the driver's status. However, where a driver meets both critical factors and one of these three significant factors, the driver qualifies as an independent contractor.

1. Instructions. Instructions is a significant factor because the degree of control over when, where, and how the livery service is provided indicates whether or not the company has the right to control the driver. Instructions may be written or oral. Written contracts establish the relationship between the company and the drivers, rather than impose specific job instructions. Company policies, on the other hand, often contain instructions, which are memorialized in manuals, handbooks, regulations, memoranda, posted placards, handouts, and training materials. Instructions may also be conveyed informally to drivers at meetings or by telephone.

An employer has the right to dictate how services are to be performed in order to promote its own business interest. A person who is required to comply with instructions about how to work is ordinarily an employee. If the company has the right to control through the manner in which the livery service is provided, an employer-employee relationship is indicated, whether

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or not the right to control is exercised.

The absence of instructions in providing services indicates the workers' autonomy and the drivers' ability to control their own business interests. However, instructions concerning *what* should be done are often consistent with independent contractor status. In the limousine industry, the limousine company may communicate to the driver the passenger's instructions concerning the time and place of service. Due to considerations of passenger safety, comfort, and security, the limousine company may also require the driver to drive a well-maintained, full-sized vehicle, to dress in the customary limousine driver uniform (suit, white shirt, and tie), and to display a company logo in or on the vehicle. The limousine company may also require the driver to follow certain protocols to facilitate radio communications and dispatch procedures.

On the other hand, instructions on *how* the driver should perform the services (e.g., must greet customers in a particular fashion, must follow certain procedures in loading luggage, must take certain routes, must take breaks at specified times) are evidence of an employment relationship. A company using independent contractors may suggest how drivers perform, but it cannot, and does not have the right to, enforce this type of policy.

The following lists contain instructions that may be found in the limousine industry. One list contains instructions by a

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limousine company that are consistent with independent contractor status; the other list contains instructions that are not.

Group 1: *Instructions of the following nature are consistent with independent contractor status because they are related to the results of service to be accomplished rather than to the manner of accomplishing the service, or because they are primarily related to factors such as passenger safety, comfort, and security.*

- (1) Where and when to pick up passengers, and where to drop them off.
- (2) Reasonable parameters for age, color, and capacity of vehicles and requirement that vehicle be clean, safe, and upscale.
- (3) Requirement that company logo be displayed in or on the vehicle and that driver wear a suit, white shirt, and tie.
- (4) Requirements regarding communications protocols.
- (5) Requirements regarding processing of charge slips and accounting to the company for passenger revenues that are to be divided between the driver and the company.
- (6) Dispatching protocols (*e.g.*, allocation of jobs by geographic location of vehicle and availability of driver, or other neutral standards).
- (7) Requirements regarding the reporting of accidents and customer complaints.

Group 2: *Instructions of the following nature are not consistent with independent contractor status because they are related to how the service is accomplished.*

- (1) Requirements prescribing routes of travel (except as required by customers) and specific holding areas, where limousine drivers wait during periods of inactivity (except as required by third parties, such as municipalities and airport authorities).
- (2) Requirements fixing work hours, prescribing a minimum number of work hours, daily or weekly number of jobs, or otherwise fixing the driver's work schedule.

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(3) Requirement that drivers accept all jobs offered to them by the limousine company.

(4) Requirement that drivers refrain from using vehicle for personal reasons.

(5) Requirement that drivers use certain suppliers for insurance, fuel, or repairs.

(6) Requirement that driver perform all services personally and not substitute other drivers.

(7) Requirement that drivers stock their cars with specific food and drink items, reading materials, umbrellas, etc.

(8) Requirements regarding how the driver should greet passengers and load passengers and luggage.

The presence of instructions of the type in Group 1 is treated as a neutral factor, but a significant presence of instructions of the type in Group 2 may prevent a driver from meeting this factor.

Failure to meet the requirements under the instructions factor does not necessarily mean that the driver cannot meet the requirements under the Guidelines for independent contractor status and must be classified as an employee. In general, a driver who meets the two critical factors discussed above and any one of the significant factors discussed in this section is treated as an independent contractor. Therefore, if the facts concerning instructions suggest employee status, the examiner should consider the whether the requirements under the other significant factors are met before reaching a conclusion.

However, in some cases, the presence of instructions of the type in Group 2 may be so pervasive that the company's control

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overrides the fact that the drivers: 1) own or lease the vehicle; 2) have the opportunity for profit or loss; and 3) can make their services available to the public or can substitute drivers. An examiner may determine that the extent of such instructions is so great that the company appears to have the right to control the driver despite the analysis provided in these guidelines. In this situation, all relevant evidence bearing on the right to direct and control should be weighed.

2. Making Service Available to the Public. The fact that drivers make their services available to the general public usually indicates an independent contractor relationship. This factor is significant because independent contractors control the marketing of their services to the general public. Employees rely upon the marketing efforts or direction of their employer.

Independent contractors will market their own services to promote their business. Employees are unlikely to spend time and money to promote their employer's business.¹¹ Drivers may advertise in a variety of ways. They may place an advertisement in local newspapers or the Yellow Pages. However, in the limousine industry, it is typically the companies and not individual drivers who advertise in the media. Drivers may advertise by putting their name on their van or on invoices and credit card chits. Drivers often build a client base by passing

¹¹ Some employees are permitted to do a certain amount of "moonlighting."

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out their business cards, "talking up" passengers, developing a reputation for reliability, stocking specialty items, and securing corporate contracts.¹² The fact that a driver has business cards or does some small amount of solicitation does not indicate independent contractor status. Once again, driver agreements and company policies should be reviewed to determine whether the company prohibits or restricts advertising; this indicates employee status. The facts must be reviewed carefully to determine whether or not the drivers are actively soliciting business and distinguishing their services from those of the company.

3. Rendering Services Personally. If the services must be rendered personally by the driver, it may be presumed that the limousine company is interested in controlling the methods of operation as well as the results. This tends to indicate an employer and employee relationship. On the other hand, the driver's right to substitute others to perform the services indicates independent contractor status.

Limousine companies may restrict or prohibit the use of substitute drivers. These restrictions may control and direct the livery service to the benefit of the company. Such

¹² Under some franchise arrangements, the franchisor provides dispatch service, advertising, and billing services. In this situation, the company is providing specific services to the drivers. The drivers may be independent contractors where there are no restrictions on competition, they own and control their vehicles, they have an opportunity for profit or loss, and they have a significant investment in the franchise agreement itself.

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restrictions may indicate an employer-employee relationship.

Sometimes restrictions on substitution arise from state licensing and insurance requirements. A company may restrict driver substitution based on regulatory requirements if it is reasonably concerned about potential liability arising from the company's ownership of the leased vehicle. For example, some companies permit the driver to substitute other qualified drivers of his choosing to provide services under his agreement with the limousine company if the substitute drivers have a valid driver's license and a good driving record and no regulatory or legal problems. This does not mean the driver is an employee. Finally, where the drivers have the right of substitution, and the right is exercised, this factor tends to indicate independent contractor status.

D. NON-SIGNIFICANT FACTORS.

The following factors have been examined and have been deemed to be non-significant or generally not applicable in the determination of driver status in the Industry because they can apply to employees and independent contractors. These factors are given only minimal weight unless the preceding analysis is so indeterminate that a conclusion cannot be drawn from the tests above.

1. Training. Training a person indicates that the employer wants the services performed in a particular method or manner. Independent contractors ordinarily use their own method of

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training and do not receive training from the purchaser of their services. Driving a limousine does not require intensive training.

2. Part of Regular Business Activity. In determining worker status, courts often consider whether the worker's services are a key aspect of the regular business activity.

All limousine companies need a driver and a vehicle in some capacity. The question is whether the driver is "engaged in a distinct occupation or business" or whether the driver "is a part of the regular business of the employer."¹³ The profit or loss factor was deemed to more accurately assist in this determination and, thus, this factor was deemed non-significant.

3. Hiring, Supervising, and Paying Assistants. When a company retains control over assistants, it controls the quality and quantity of the workers. This is indicative of an employer and employee relationship. If the worker has sole authority over assistants, an independent contractor status is indicated.

Aside from the ability to hire substitute drivers, as discussed in the previous section, this factor is not particularly relevant in the Industry because assistants are rarely used.

4. Continuing relationship. Courts have considered the existence of a permanent relationship between the worker and the business as relevant evidence in determining whether there is an

¹³ Rev. Rul. 66-267, 1966-2 C.B. 443.

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employer-employee relationship. If a business engages a worker with the expectation that the relationship will continue indefinitely, rather than for a specific project or period, this is generally considered evidence of their intent to create an employment relationship. However, a relationship that is created with the expectation that it will be indefinite should not be confused with a long-term relationship. A long-term relationship may exist between a business and either an independent contractor or an employee.

This factor was determined not to be significant because of the use of driving contracts in the industry. Drivers may own their vehicle, but enter into a driving contract with a company. In many leasing situations, the lease is tied to a driving contract. As discussed above, some driving contracts require exclusivity--the driver cannot drive for other companies. The examiner considers exclusivity provisions when determining whether the ownership/lease is bona fide, as well as whether profit and loss potential exists. If the examiner determines that the ownership/lease is bona fide and the driver can realize profit or loss, it is possible that there may be a continuing relationship but the driver is an independent contractor.

5. Working Set Hours. The establishment of set hours of work by the company is an example of instructions indicating control. In the limousine industry, some companies establish shifts. However, because of the nature of the work, many

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companies rely upon the drivers being "on call" or wearing beepers at specified times. In either case, the fact that a company requires drivers to be available at specific times indicates control but it is relatively non-significant.

6. Full Time Work Required. The fact that a worker performed services on a part-time basis or worked for more than one person or business was once thought to be significant evidence indicating that the worker was an independent contractor. However, in today's economy, whether a worker performs services on a full-time or part-time basis is a neutral fact.

7. Doing Work on Employer's Premises. Whether work is performed on the business's premises or at a location selected by the business often has no bearing on worker status. Even when it is relevant evidence, it will be relevant because it illustrates that business's right to direct and control how the work is performed and will have been considered in connection with instructions.

8. Set Order or Sequence. A company which establishes the routines and schedules of the worker reduces the ability of the worker to create and follow his own pattern of work. Because this is an example of an instruction, it will already have been considered.

9. Oral or Written Reports. All limousine companies need to collect and maintain records of fares and other financial

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records.¹⁴ When oral or written reports collect information on problems encountered on the run, customer satisfaction, and how the job was done, this suggests even more strongly the presence of an employer-employee relationship. However, because requiring reports is an example of instructions, it will already have been explored.

10. Payment by Hour, Week, or Month. Although some types of independent contractors are often paid by the hour in this industry, payment by the hour, week, or month generally indicates an employee-employer relationship. In contrast, flat fee payment tends to indicate independent contractor status, while commission payments are neutral.

This fact is not particularly relevant because most limousine companies pay on a schedule and do not pay on a time basis. Most drivers work on a percentage commission, which is a neutral fact, although employees may also receive base pay for waiting time during shifts. In the Industry, a weekly or monthly schedule for making payments tends to be adopted because of credit card and corporate billing cycles. However, when payments are made is not relevant--it is the method of calculating payments that is important.

11. Payment of Business and/or Traveling Expenses.
Workers who pay their own expenses tend to control how the

¹⁴ The one exception is some leasing firms which charge fixed fees at regular intervals and are not involved in the livery service.

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service is provided.

In the limousine industry, this fact can be highly relevant or not at all relevant. The two major expenses in the Industry have already been considered under "significant investment." These items are the purchase/lease payments on the vehicle and insurance. Other expenses worthy of consideration are payments for repairs, maintenance, fuel, licenses, permits, franchises, alarm systems, beepers, radios, telephones, and cleaning expenses. Finally, incidental expenses--such as maps, magazines and sodas--are relatively de minimis by comparison. All these were considered in connection with profit or loss.

12. Furnishing Tools and Materials. When the worker selects and furnishes the equipment and tools necessary to complete the job, the worker makes an investment or incurs expenses that affect the opportunity for profit or loss. The relevant facts inherent in this factor have therefore been considered already.

13. Working for More Than One Firm. If a worker performs more than de minimis services for several unrelated persons or firms at the same time, that fact may indicate that the worker is an independent contractor. However, a worker who performs services for more than one person may be an employee of each of the persons, especially where such persons are part of the same service arrangement. Facts relevant to this issue will already have been considered in connection with holding oneself out to the public.

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14. Right to Discharge. An employer has the present right to dismiss an employee; this power causes the worker to follow instructions. Conversely, a business can only terminate a contractual relationship with an independent contractor for breach of contract. Thus, the right to discharge has traditionally been associated with the employer-employee relationship, and the absence of that right with the independent contractor.

Labor law protections for employees and the threat of wrongful termination litigation have curtailed the absolute right of employers to discharge employees. Further, many companies contractually agree to give drivers a certain amount of notice before exercising their right to discharge. Accordingly, this type of evidence may suggest an erroneous conclusion concerning the employment relationship, and, therefore, should be used with great caution.

15. Right to Terminate. In the past, workers with the right to terminate their services at any time without incurring liability were employees. In contrast, an independent contractor was committed to fulfill the terms of the contract or be subject to civil redress.

As with the employer's right to discharge, contracts used in the Industry often modify this traditional approach. As a result, evidence concerning the right to terminate may suggest an erroneous conclusion concerning the employment relationship and

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should be used with great caution.

16. Benefits. Providing a worker employee benefits, such as paid vacation days, paid sick days, health insurance, life or disability insurance, or a pension, constitutes some evidence of employee status. However, the failure to provide benefits is not considered evidence of independent contractor status.

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V. THE USE OF WRITTEN DOCUMENTATION

The creation of documentation to clarify the intent of the company and the worker engaged in any task may be useful in the classification process. For instance, a lease agreement may show that the driver has a potential for profit or loss. However, documentation cannot itself determine the classification of a worker. The Service will examine each relationship using the Critical and Significant factors pertinent to the limousine industry. Written agreements or contracts established between the parties may provide additional evidence bearing on the limousine driver's status. If it is difficult to decide whether a limousine driver is an independent contractor or an employee, the intent of the parties, as reflected in the contractual designation, may be used to resolve the issue.¹⁵

¹⁵ Although the manner in which a business reports the income of a worker under state and federal law (i.e., Form W-2 or Form 1099) is not evidence of the worker's employment status, the business's reporting practice may be evidence of the parties' intent as to the worker's employment status.