

**SS-8 Determination—Determination for Public Inspection**

Occupation 02ABT.29 Accounting/TxPrepWkr	Determination: <input checked="" type="checkbox"/> Employee <input type="checkbox"/> Contractor
UILC	Third Party Communication: <input checked="" type="checkbox"/> None <input type="checkbox"/> Yes

**Facts of Case**

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The worker initiated the request for a determination of her work status as a accountant/project manager in tax years 2012 through 2016. From 2008 through October 2012 she was issued Form W-2; she resigned her position in September 2012 to move out of state. The firm offered her the opportunity to work remotely and to work as a contract employee; in subsequent years she was issued Form 1099-MISC. The differences from prior to current services were that she no longer supervised employees and had more tasks added to her workload some of which had been performed by the director of finance. The firm's business is described as a management company of family-operated businesses, which included hospitality and real estate.

The firm's response was signed by the CEO. The firm's business is described as administrative services for hospitality, real estate, and other businesses. The worker performed services that included executive and confidential payroll, census data for 401k company, and analysis of financial data; she provided project and accounting services.

According to the firm, the worker was not provided any specific training due to her years of accounting experience as an employee from July 2008 to October 2012. Periodic meetings were held via telephone as to job assignments. The worker determined the methods by which the services were rendered; any problems or complaints encountered by the worker were directed to CEO or finance director. There were no specific reports required from the worker; although, she provided status updates on special projects. The worker set her own hours and was asked to participate in periodic meetings to update management. The worker performed all services from her home until she moved back to ██████████ and then she would periodically come to corporate offices for meetings. The firm responded that the worker was not required to perform services personally and could hire substitutes or helpers, indicating the firm's approval was not required and there was no reimbursement for helpers/substitutes.

The worker indicated that there was periodic informal training and instructions on new procedures and processes. Some of her job assignments were carried over from prior services (pre-October 2012) and new assignments were assigned during scheduled weekly or bi-weekly team meetings. Meetings were held via Go To Meeting and telephone sessions and when she returned to ██████████ there were also occasional in-person meetings. She responded that the additional assignments and projects were assigned by CEO, Finance Director, and beginning in January 2016 by the director of admin services. The worker indicated the firm determined the methods by which she performed the services. The only reports required were weekly action item reports which were used during weekly or biweekly team meetings. The services were rendered from her home but she would occasionally work from the firm's offices when in ██████████. After moving back to ██████████, and after being assigned a new payroll to perform (September 2016), the worker was required to work from firm's offices one day a week every other week, as well as to go into firm's offices for meetings as required/requested by the CEO. The worker stated she was required to perform the services personally; any additional personnel were hired and paid by the firm.

The firm provided a video phone at end of 2013 and due to poor connectivity the firm provided a laptop in 2016; the worker agreed and added that she was provided a remote connection to the firm's server. Both parties acknowledged the worker provided computer, phone, internet, office space, and office supplies; but, the worker did not lease space, equipment, or a facility. In addition, the worker incurred cost/expenses for utilities, postage, phone service; the firm did not reimburse for any expenses, but did pay from one trip from her home to ██████████, excluding meals. The worker was paid an hourly wage. Both parties responded that the worker was not at risk for a financial loss in this work relationship; however, the firm and worker did not agree as to which party established the level of payment for the services provided.

There were no benefits extended to the worker; although the firm noted the worker received a one-time incentive. 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; her hours were generally 45 hours per week for the firm. The worker resigned her position in October 2016 and returned the equipment the firm had assigned to her.

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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. In this case, the worker came into the work relationship with knowledge of the firm's work processes.

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. In this case, the worker continued to perform services for the firm, remotely with access to the firm's systems.

If the work is performed on the premises of the person or persons for whom the services are performed, that factor suggests control over the worker, especially if the work could be done elsewhere. Work done off the premises of the person or persons receiving the services, such as at the office of the worker, indicates some freedom from control. However, this fact by itself does not mean that the worker is not an employee. The importance of this factor depends on the nature of the service involved and the extent to which an employer generally would require that employees perform such services on the employer's premises.

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. 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. The worker was not operating a separate and distinct business; the worker did not establish a business presence, 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.

## 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.