

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

Occupation 02LAW.22	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**

Information provided indicated the firm is a legal and technology consulting service business. The worker had been retained as a contract attorney for April and May of 2013 to provide legal expertise to ██████████'s client. The firm provided document review services for its law firm clients on a case (project) specific basis. The document review required trained attorneys who could make informed judgments about whether a particular document was responsive to discovery request, was privileged or met other criteria set by the client. The firm solicits licensed attorneys through various advertisements in order to form a document review team. ██████████ was one of a group of attorneys whom they contracted to review documents for a specific project that was expected to last approximately one month. After that project ended, no other work was performed, and he was issued a 1099. No additional benefits were provided. He decided when to arrive and how long to work. He was under no compulsion to work from one day to the next or to finish any document. He completed the document review without supervision. The worker was given one hour of project overview/instructions regarding expected outcome of work product, provided by the Client and ██████████. Work assignments are given within the software application they are allocated a batch of documents to review. He reports to the firm VP and Review Manager if he has any issues. All work must be performed at the firm's location due to physical and technical security requirements of the client. He is required to perform services personally. The firm provided the secure worksite, computer, and electronic documents for review. He had to be licensed to practice law and active bar standing. He was paid by the hour. The customer paid the firm. Either could terminate the work relationship without incurring a penalty or liability. The firm stated he advertised himself as Law office of ██████████. All finished work stays with the firm. He was represented as a contract attorney. The project ended. He did not express interest in continued work.

The worker stated he was provided training, directions and guidance from ██████████ and he had no discretion as to how to perform his duties. Work was assigned and checked. He was required to be on site; all necessary equipment was provided and maintained by the firm. He has provided the letters that stated he was an IC. He stated training was provided by the supervisor ██████████, in regards to the use of software and the protocol used to review electronically stored documents. The firm assigned all work. He was required to enter his time in a time tracking software and also record his time on a paper time sheet submitted at the end of the week. He stated he was required to be at the office daily and to work 40 hours per week, any overtime had to be authorized. He would arrive at the review center log into the provided computer and work on the assigned set of documents per the training provided by the firm. He was required to perform the work on site at ██████████'s review center. He stated he was required to attend training sessions and ad hoc meetings regarding quality control. The firm provided all equipment/supplies/space. He was paid by the hour, the customer paid the firm. All work was performed under the firm business name. He was laid off, it was reported that new documents were not released.

Both parties provided a copy of the generic cover letter dated April 7, 2013 offering the engagement as an independent contractor to perform document review. It states as an attorney independent contractor, he would receive \$30 per hour and would be paid monthly as a 1099 independent contractor and will be expected to account for their own tax with holdings. No benefits will be offered. They are to physically report to the firm's office in ██████████ where their supervisor will be ██████████; although they are expected to take direction from other employees as such arises. They have no property or privacy interest in any data they review. No guaranteed hours and no benefits will be given. The offer is contingent upon reviewing, and freely agreeing to sign the Covenants and other terms and conditions of engagement, ██████████'s Privacy Policy, ██████████'s Harassment Policy and a W9 tax form. The worker provided a copy of those documents.

The other documents mentioned above, refer to "all ██████████ employees, which includes independent contractors ("1099 employees"), and un paid interns, must act to protect the privacy...."

A copy of the Harassment Policy issued in October 18, 2011 addressed to "all employees." was provided.

A copy of the firm's covenants and other terms and conditions of "engagement."

The worker provided a copy of an e-mail sent April 7, 2013 with instruction to be at the firm's office at 10:15 am. Use the parking garage, there is no charge; do not park in reserved spaces. Although there is a security guard, they did not need to check in with them via the elevators, go to the 7th floor. Security cards are required to use the bathrooms. It is casual dress, no flip flops, no shorts, no graphic t-shirts, no jeans with holes. They will be provided time cards; it is their responsibility to accurately track their time. Pay periods end the 15th of each month, Pay days are the 7th and 22nd. As an IC they could choose to skip lunch and get paid the whole time or eat lunch and clock out. The review center is generally open M-F 8:45-6:15, they may have extended hours into the evening. They are not open weekends or holidays. Turn off cell phone in the review center. There is an "unlocked" workstation to check personal email. Review room conversation should be kept low so as not to distract the neighbors.

## Analysis

The question of whether an individual is an independent contractor or an employee is one that is determined through consideration of the facts of a particular case along with the application of law and regulations for worker classification issues, known as “common law.” Common law flows chiefly from court decisions and is a major part of the justice system of the United States. Under the common law, the treatment of a worker as an independent contractor or an employee originates from the legal definitions developed in the law and it depends on the payer’s right to direct and control the worker in the performance of his or her duties. Section 3121(d)(2) of the Code provides that the term “employee” means any individual defined as an employee by using the usual common law rules.

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.

In determining whether an individual is an employee or an independent contractor under the common law, all evidence of both control and lack of control or independence must be considered. We must examine the relationship of the worker and the business. We consider facts that show a right to direct or control how the worker performs the specific tasks for which he or she is hired, who controls the financial aspects of the worker’s activities, and how the parties perceive their relationship. The degree of importance of each factor varies depending on the occupation and the context in which the services are performed.

Therefore, your statement that the worker was an independent contractor pursuant to an 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.

### Analysis

- 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.
- 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.
- 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. See Rev. Rul. 56-660, 1956-2 C.B. 693.

We have applied the above law to the information submitted. As is the case in almost all worker classification cases, some facts point to an employment relationship while other facts indicate independent contractor status. The determination of the worker’s status, then, rests on the weight given to the factors, keeping in mind that no one factor rules. The degree of importance of each factor varies depending on the occupation and the circumstances.

Evidence of control generally falls into three categories: behavioral control, financial control, and relationship of the parties, which are collectively referred to as the categories of evidence. In weighing the evidence, careful consideration has been given to the factors outlined below.

Factors that illustrate whether there is a right to control how a worker performs a task include training and instructions. In this case, you retained the right to change the worker’s methods and to direct the worker to the extent necessary to protect your financial investment.

Factors that illustrate whether there is a right to direct and control the financial aspects of the worker’s activities include significant investment, unreimbursed expenses, the methods of payment, and the opportunity for profit or loss. In this case, 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.

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 your business. Both parties retained the right to terminate the work relationship at any time without incurring a liability.

### 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 was not performing services under his own business or business name. The worker had been retained to provide his services because of his expertise as a licensed attorney. However, services were performed on the firm premises, utilizing the firm’s equipment. Training was provided by the firm relating to the use of the software and protocols to be followed. Services were performed under an assigned supervisor. The worker was required to enter his time on the firm’s time tracking software as well as a paper time sheet at the end of the week. The worker was paid by the hour. Both firm and worker provided documentation that stated the work performed was an integral part of the firm’s business. It all stated all independent contractors were “1099 employees.” The worker was required to follow the firm’s policies and procedures to include their harassment policy, privacy policy, and covenant non-compete agreements.