

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

Occupation 02OFF.28 Administrative Assist	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**

The worker initiated the request for a determination of his work status as a data entry and administrative assistant in tax year 2013. His duties include but are not limited to: entry of patient information, scheduling, clerical work, and chart audits. The worker was issued Form 1099-MISC for 2013; however, he indicated he did similar work but not in the same capacity in October to December 2012. The firm's business is described as a home health care agency. The certified staff go out to patient's homes and perform skilled services such as Physical Therapy, Occupation and/or Speech Therapy, Skilled Nursing, Home Health Aid, etc. The number of workers in the class is one.

The firm's response was signed by [REDACTED], President/Owner. The firm's business is described as a home health care agency providing PT, SN, OT, ST, HHA, & MSW to patients that are considered 'home bound' and are unable to do their own daily activities to take care of themselves. The worker performs services doing data entry and is a case manager and he is also considered an administrative assistant. The worker is considered an employee since the day he started; he works Monday through Friday from 9 a.m. to 5 p.m.. He is entitled to PTO and vacation time just like everyone else in the office. This is his only job and only source of income. Prior services were rendered October through December 2012 ( the worker was issued Form 1099-MISC); he has more responsibilities now.

According to the firm, he is given day-to-day instructions from the owner and/or administrator of what is needed or expected each day. The firm determines the methods by which the worker's services are performed. The worker is required to contact the administrator if he encounters any problems that require resolution. The worker's schedule is from 8 a.m. to 5 p.m. Monday through Friday. The worker is required to attend a mandatory monthly in-service and staff meetings. The worker is required to perform the services personally; he is not authorized to hire or pay substitutes or helpers.

The firm provides the worker with furnished work space, office supplies, and office equipment; no expenses are incurred by the worker. The firm pays the worker an hourly wage; the customers pay the firm. The firm indicated the worker is not at risk for a financial loss in this work relationship; the firm establishes the level of pay for services provided. The firm acknowledged that the worker is entitled to paid vacations, sick pay, paid holidays, and personal days. The firm indicated the worker is represented as an employee.

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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. See, for example, Rev. Rul. 68-598, 1968-2 C.B. 464, and Rev. Rul. 66-381, 1966-2 C.B. 449.

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. 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. Control over the place of work is indicated when the person or persons for whom the services are performed have the right to compel the worker to travel a designated route, to canvass a territory within a certain time, or to work at specific places as required. See Rev. Rul. 56-694, 1956-2 C.B. 694.

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. See Rev. Rul. 74-389, 1974-2 C.B. 330.

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. See Rev. Rul. 70-309, 1970-1 C.B. 199. "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. If a worker loses payment from the firm's customer for poor work, the firm shares the risk of such loss. Control of the firm over the worker would be necessary in order to reduce the risk of financial loss to the firm. The opportunity for higher earnings or of gain or loss from a commission arrangement is not considered profit or loss.

We have considered the information provided by both parties and have applied the above law 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 to ensure its customers' satisfaction. The worker was not operating a separate and distinct business in 2012 and 2013. 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.