

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

Occupation 02OFF.140 Office Worker	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 submitted a request for a determination of worker status in regard to services performed for the firm as an office assistant. The work done by the worker included answering calls, setting up testers, calling clients for late payments, and preparing monthly invoices. The firm issued the worker Form 1099-MISC for 2014. The worker filed Form SS-8 as she believes she erroneously received Form 1099-MISC.

The firm's response stated its business is software consulting. Hired as a part-time contractor the worker attended phones, assisted people coming into the office, collected time from consultants, organized office files whenever needed, and occasionally bound proposals as needed. The firm believes the worker was an independent contractor as the tasks performed were not essential to the firm's operations or part of an operational team; similar part-time workers have always been classified as independent contractors by the firm; the firm did not train the worker, set her work schedule, or reimburse her for expenses; the worker was performing services for others, she invoiced the firm for services performed, and ended the work relationship; the firm timely provided Form 1099-MISC. The work position was advertised as an independent contractor receiving Form 1099-MISC.

The firm stated it did not provide specific training or instruction to the worker. Work assignments were given to the worker on an as-needed basis. The work performed was straight forward. If problems or complaints arose, anyone in the office could be contacted for resolution. Reports and meetings were not required. Copies of invoices provided by the firm document the worker personally invoiced the firm for hours worked. The total amount due was based on an hourly rate of pay. The worker's hours were flexible. Services were performed at the firm's premises. The firm required the worker to personally perform services. Hiring and paying substitutes or helpers was not applicable. The worker stated the firm provided specific training and/or instruction on the [REDACTED] testing center. The firm's president, vice president, and senior recruiter provided work assignments. The firm determined the methods used and assumed responsibility for problem resolution. The worker performed services from 10 am to 2 pm, Monday through Friday. The firm required the worker to attend Friday lunch meetings.

The firm provided a computer, phone, and desk. The worker provided her cell phone. The worker did not lease equipment, space, or a facility. The worker did not incur expenses in performing services for the firm. Customers paid the firm. The firm paid the worker bi-weekly. As noted above, pay was based on 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 did not incur economic loss or financial risk. The firm stated the worker established the level of payment for the services provided; however, the worker stated the firm set the rate of pay.

The work relationship could be terminated by either party without incurring liability or penalty. The firm stated the worker performed similar services for others; the firm's approval was not required for her to do so. The work relationship ended when the worker quit. The worker stated she did not perform similar services for others or advertise. The work relationship ended when she was fired.

A copy of the firm's online job advertisement documents it sought a part-time (four hours) office assistant. Job responsibilities included time sheet management, phone call management, travel arrangements, printing/copying/binding, office supply procurement, follow up with vendors for sales and payments, e-mail management, and other routine office assistant work. The candidate needed to have strong communication skills and needed to be comfortable in making calls. Performance could lead to a full-time permanent job. An hourly rate of pay, on Form 1099-MISC, was also disclosed in the advertisement.

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## Analysis

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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.

If the services must be rendered personally, presumably the person or persons for whom the services are performed are interested in the methods used to accomplish the work as well as in the results. In this case, the firm required the worker to personally perform services. The firm provided work assignments and ultimately 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. Based on the hourly rate of pay arrangement and as acknowledged by the firm, the worker did not incur economic loss or financial risk.

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. 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.