

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

Occupation 02OFF.187 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 firm provided legal services in the areas of patent prosecution. It prepares patent applications, provides education seminars/services to clients and trains foreign professionals about patent law and process. The firm stated the worker had been retained in 2014 as counsel to the firm as an independent contractor to prepare patent applications on a project by project basis. Both firm and worker provided a copy of the e-mail stating it would be as a 1099 independent contractor. The worker stated her title was patent agent. The firm stated the business was dissolved in February of 2015.

The firm indicated the worker was an experienced patent attorney who obtained all qualifications to practice as a patent attorney at her own expense and time. The firm offered projects based on her expertise. If accepted, she controlled the method and manner in which to complete the project. The worker submitted invoices to the firm for payment (samples provided). There was no regular routine. The firm had no control over the hours of employment. The worker performed services on her own time for projects she accepted. She was not required to be at the firm's offices. No meetings were required. She was to perform her services personally. When work was performed at the office, the firm provided a computer and supplies. She had office space at her home. The worker was paid on a paid per project basis. The client paid the firm. Either party could terminate the work relationship without incurring a penalty or liability. She performed similar work for others; the firm's permission was not required to do so. She also provided services to law firm of [REDACTED]. The worker would have been represented as counsel for the firm. The firm stated the worker no longer accepted projects after June 18, 2014.

The worker stated the firm provided specific instructions on how the work was to be performed. She was required to attend mandatory training sessions and meetings focused on learning how to do the work. The firm assigned the projects to her. She was required to contact the firm for issues or problems. Once an assigned project was completed, she was required to provide an invoice with a description of work and a suggested amount to bill the client. The actual amount billed was determined by the firm. The worker stated she had flexibility over the hours worked, she had specific deadlines in which the projects were to be completed. She agreed she could work from home or at the office. She was required to go into the office when called. She was required to attend training seminars, meetings with clients, and meetings to share her work with others. She was required to come into work at least 2 days a week and train other employees. Services were to be performed personally. She was paid 40% of the billed amount to the client. The client paid the firm. Either party could terminate without incurring a penalty or liability. She agreed she performed similar services for others. The firm orally forbid her to perform similar services for other entities. She stated she had done work on a project for another entity on the weekend, but the firm was not aware of that. She was represented as an employee of the firm. She was listed on the firm's website as an employee. She stated she was laid off.

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.

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## Analysis

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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.

If a worker must perform services in the order or sequence set by the person or persons for whom the services are performed, that factor shows that the worker is not free to follow the worker's own patterns of work. Often, because of the nature of an occupation, the person or persons for whom the services are performed do not set the order of the services or set the order infrequently. However, if the person or persons retain the right to control the order or sequence of the work, this is sufficient to indicate an employer-employee relationship.

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 not an independent contractor operating a trade or business.