

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

Occupation 02OFF.216 OfficeWorker	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 provides on line traffic school courses to students. The firm indicated the worker was a call representative for the firm. She was hired to answer the firm's 1-800 number on weekends. The firm indicated the worker(s) are independent because they can answer where and when they want. The firm reported the income on Form 1099-MISC for tax years 2014 and 2015. The worker is instructed how the traffic schools work, how much the firm charges, and some common questions asked by callers and how to respond. The worker gets calls on her cell phone. They can either answer the call then, or call the person back, when they have time. The firm provides the website access. The worker provides her cell phone and computer. The firm indicated the worker is paid by the hour. The customer pays the firm. Either party can terminate the work relationship without incurring a penalty or liability. She is referred to as a representative for the firm. Services are performed under the firm's business name. The firm indicated they no longer required her services.

The worker indicated she was a full time student and worked on a part time basis for the firm. She provided secretary, clerical assistance and answered phone calls for tech support, responded to e-mails, helped with reports and inspections from the DMV, and took phone calls on the weekends from eight am to ten pm. Work assignments came from the firm's owners. They would assign specific tasks for her each day in addition to the normal daily work. She reported how many students enrolled, how many completed the course, and corrections made to the website whenever DMV regulations were broken. She stated she worked eight am to six pm shifts weekdays, and weekends eight am to ten pm answering calls forwarded to her cell phone. Most of the time she worked at the [REDACTED] location. She was to perform her services personally. The firm hired and paid all workers. The worker indicated the firm provided the computer, office, phone, printer and supplies. She used her cell phone on weekends. She indicated she was paid by the hour. The customer paid the firm. On the firm's website they are referred to as representatives. She indicated she quit.

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. 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.

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## Analysis

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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.

A requirement that the worker submit regular or written reports to the person or persons for whom the services are performed indicates a degree of control.

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.

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. In this instance, the worker did not own her own business, nor did she advertise herself as being in business to provide her services. She performed services on firm premises (as well as at her home) on a flexible work schedule. The on call representatives are performing services under the firm's business name. The firm is in business to provide assistance to their clients attempting to complete the traffic courses they offer. Whether the worker was paid a lump sum, or by the hour, in either instance she was not in a position to incur a profit or suffer a financial loss.