

## SS-8 Determination—Determination for Public Inspection

Occupation OFF02.244 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

It is our usual practice in cases of this type to solicit information from both parties involved. Upon the submission of the Form SS-8 from the worker, we requested information from the firm concerning this work relationship. The firm responded to our request for completion of Form SS-8.

From the information provided the firm is an election software company and the worker was engaged to provide election services. His services included setting up equipment and software in preparation for elections and surveying sites and preparing diagrams. The firm believes the worker was an independent contractor (IC) because the worker determined when and if he worked, he refused assignments, he took weeks off at a time, he was given great leeway to perform his tasks, he agreed he was an independent contractor, and they attempted to make him an employee in early 2016 but he refused saying he preferred to remain an independent contractor.

The firm provided the worker with a checklist for setting up equipment and past examples were given to him for site diagrams. The firm states the worker received verbal assignments from them and the worker determined how to perform his services regarding site diagrams and they determined how the worker set up the equipment. The worker was required to personally perform his services at the firm's warehouse or at polling locations. The firm states the worker was required to notify their regional coordinator if any problems or complaints arose for their resolution. The worker submitted product finished checklists and finished diagrams to the firm. The firm states the worker's schedule varied as he may spend several hours configuring computers, he may go to polling locations to handle a problem, or he may be at their office working on diagrams. The worker was not required to attend meetings.

The firm provided equipment to the worker in order to perform his services. The firm states there were no other tools that were needed by the worker to do the work. The worker incurred occasional mileage expenses to the polling location which the firm reimbursed. The firm paid the worker at an hourly rate and he did not have an opportunity to incur a loss as a result of his services. The firm reported the worker's earnings on Forms 1099-MISC.

The worker was not required to seek the firm's approval in order to work for others and a non-compete agreement did not exist between the firm and the worker. The worker did not advertise his services. The firm states the worker said he was starting his own business but that business would not have been related to the work he performed for them. Either party could terminate the work relationship at any time without either party incurring a liability. The firm terminated the work relationship.

The firm provided a copy of their contractor expectations sheet and highlighted copies of emails from the worker to the firm where, in the conversation of the email, the worker states he was very glad that he was considered an independent contractor and in the days between elections, he enjoys the great flexibility with his schedule, coming and going as he pleased.

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## Analysis

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As is the case and 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, the worker did not require training or detailed instructions from the firm. However, the need to direct and control a worker and his services should not be confused with the right to direct and control. The firm required that the worker submit daily timesheets and he reported to a supervisor per the firm's contractor expectations sheet. The worker provided his services on behalf of and under the firm's business name rather than an entity of his own. The firm was responsible for the quality of the work performed by the worker and for the satisfaction of their clients. This gave the firm the right to direct and control the worker and his services in order to protect their financial investment, their business reputation, and their relationship with their clients.

The firm's statement that the worker performed services on an as needed basis and infrequent basis and therefore, an independent contractor is without merit as both employees (seasonal) and independent contractors can perform services when the needs of a business warrants. A continuing relationship was established rather than a one-time transaction taking place. A continuing relationship may exist where work is performed in frequently recurring although irregular intervals. The existence of a continuing relationship indicates an employer/employee relationship was established.

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.

A person who can realize a profit or suffer a loss as a result of his services is generally an independent contractor, while the person who cannot is an employee. "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 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.

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 the firm's business. There was no evidence presented or found in this investigation that indicates the worker had an investment in a business related to the services he performed for the firm offering those services to the general public. Both parties retained the right to terminate the work relationship at any time without incurring a liability.

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.