

# SS-8 Determination—Determination for Public Inspection

Occupation 02PDP.3 PublishEditProducing	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 software engineer in tax years 2013 and 2014. The firm's business is described as buying tickets to events and selling them for a profit. The firm issued the worker Form 1099-MISC to report his earnings.

The firm's response was signed by [REDACTED], president. The firm's business is described as software/technology company that creates web programs and web sites. The worker performed services as a computer programmer. The number of workers in the class was 4.

According to the firm, the worker was given instruction to build websites, host them, and maintain the back-up repository. The firm would email the worker his job assignments and what needed to be accomplished and viewed on the website. The firm determined the methods by which assignments were performed. The worker was required to contact president of company if he encountered any problems that required resolution. The firm indicated that 95% of the worker's time was off site. The worker was required to perform the services personally. The worker indicated that services were rendered primarily at the firm's location for 10.66 hours per day Monday through Wednesday and the remainder of the time the worker as permitted to work from home.

The firm responded that nothing was provided to the worker in terms of equipment, supplies, and materials. The worker provided a laptop computer; he did not lease equipment, space, or facilities and did not incur expenses in the performance of his job. The customer paid the firm; the firm paid the worker an hourly wage. The firm responded that the worker was not at risk for a financial loss in this work relationship. The president of the firm established the level of payment for products sold or services provided. The worker indicated the firm provided the worker with office space, office furnishings, computer, mini-fridge and microwave; the worker furnished nothing.

There were no benefits extended to the worker. Either party could terminate the work relationship without incurring a liability or penalty. The worker was not performing same or similar services for others during the same time frame. The firm responded that the worker was terminated after he requested a change of terms to the agreement as well as more money.

Both parties provided copies of the worker's detailed time card as well as a copy of the 'Consulting Agreement' which provided the following: the company engaged in the business of public event ticket purchasing and sales and the development of software with the worker engaged to provide business-related services; hours and location of services, hourly rate, and timekeeping/code transmittal; in addition to proprietary information and non-solicitation of customers, suppliers, and service providers.

The worker submitted a copy of an email between the parties with regards to employee classification, increase hourly rate, vacation days, unemployment compensation.

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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.

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.

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 and that its contractual obligations were met. The worker was not operating a separate and distinct business; 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.