

# SS-8 Determination—Determination for Public Inspection

Occupation 03FMW.3 Factory/Mill 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 from October 2011 to present (2015) as an assembly worker. The work done is assembling mail for distribution. The firm's business is printing and distribution. The worker provided a copy of a 2013 and 2014 Form 1099-MISC issued by the firm to [REDACTED]. Federal income tax withheld was also reported for 2013 and 2014. When questioned about the discrepancy in names, the worker stated [REDACTED] is a fictitious name she provided to the firm. It is noted the recipient's tax identification number reported on the Forms 1099-MISC does not match the worker's tax identification number. The worker filed Form SS-8 as she believes she erroneously received Form 1099-MISC.

A letter was initially received from the firm which stated, in part, it had no records from 2005 through 2013 for an individual, contract laborer or employee, by the name of [REDACTED]. A firm-prepared letter, subsequently faxed to us by the worker, stated [REDACTED] currently renders services to [REDACTED].

The worker stated the firm's supervisor provides work assignments to her. The firm determines the methods by which assignments are performed and assumes responsibility for problem resolution. The firm requires the worker to punch a time clock and complete reports. The firm requires the worker to attend quarterly meetings. The worker performs services, solely at the firm's premises, from 8 am to 4 pm, Monday through Friday. The worker sometimes works on Saturday and Sunday. The firm requires the worker to personally perform services. The firm hires and pays substitutes or helpers.

The firm provides all supplies, equipment, and materials. The worker does not lease equipment, space, or a facility. The worker does not incur expenses in performing services for the firm. Customers pay the firm. The firm pays the worker an hourly rate of pay; a drawing account for advances is not allowed. The firm carries workers' compensation insurance on the worker. The worker does not incur economic loss or financial risk. The worker does not establish the level of payment for the services provided.

Benefits are not made available to the worker. The work relationship can be terminated by either party without incurring liability or penalty. The worker does not perform similar services for others or advertise. There is no agreement prohibiting competition between the parties. The firm represents the worker as an employee to its customers. The worker continues to perform services for the firm.

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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.

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 services performed by the worker are integral to the firm's business operation. The firm provides work assignments, determines the methods used, and assumes responsibility for problem resolution. These facts evidence the firm retains the right to direct and control the worker to the extent necessary to ensure satisfactory job performance in a manner acceptable to the firm.

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. "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. In this case, the worker has not invested capital and does not 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, the worker cannot realize a profit or incur a 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 is not engaged in an independent enterprise, but rather the services performed by the worker are a necessary and integral part of the firm's business. It appears both parties retain the right to terminate the work relationship at any time without incurring a liability. There is no evidence to suggest the worker performs similar services for others as an independent contractor or advertises 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 has the right to exercise direction and control over the worker to the degree necessary to establish that the worker is a common law employee, and not an independent contractor operating a trade or business.