

# SS-8 Determination—Determination for Public Inspection

Occupation 03PMW.19 Repair Maintenance 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

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The worker initiated the request for a determination of her work status as a janitor in tax year 2013 and 2014. Her duties were to dust, mop, sweep, vacuum, sanitize offices, lobbies and break rooms, rest rooms, windows and doors and restocked paper products in the restrooms. The firm's business is described as cleaning of the ██████████. The number of workers in the class was 18.

The firm's response was submitted by a tax service and signed by ██████████; however, there was no Power of Attorney in the case. The Form SS-8 was not completed; a 1+ page narrative was submitted. The firm is a cleaning business that cleans office spaces at night. The firm engaged worker(s) to do cleaning. The number of workers in the class was not identified.

According to the response submitted on behalf of the firm, the firm had verbal contracts with several businesses to clean office spaces at night. There was no restriction placed on the firm as to equipment or supplies to be used or who actually did the cleaning. The worker was not required to perform the services personally – the worker(s) utilized someone else to help them and the firm did not pay the helpers. There was no supervision on the part of the firm. The firm paid the worker(s) an agreed contract wage; there was no reimbursement, no supplies, and no tools provided. There was no written contract and no benefits extended to the worker(s). There was a long term relationship involved that was cancellable by either party. The services were central to the business; but, the worker(s) were not. The work could be performed by anyone at anyone's choosing.

The worker indicated she was given specific training and instructions as to how to clean each area, disarm the alarm, and what supplies and equipment to use. The firm determined the methods by which the worker's services were performed. Any problems or complaints encountered by the worker were directed to the firm for resolution. The worker performed the services at the firm's customer locations Monday through Friday starting at 5 p.m. – she cleaned her assigned area and then checked with the firm if there was anything else before she moved on to another branch. The worker stated she was required to perform the services personally; any additional personnel were hired and paid by the firm.

The firm provided vacuum, mops, rags, cleaning solutions; the worker furnished nothing. The worker did not lease equipment and did not incur expenses in the performance of the job. The customer paid the firm; the firm paid the worker a salary. The worker indicated she was covered under the firm's workers' compensation insurance policy. The worker stated she was not at risk for a financial loss in this work relationship. The firm established the level of payment for services provided.

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 worker stated she was wearing a shirt with the firm info on it as a form of advertising.

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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.

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.