

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

Occupation 03PMW.95 RepairMaintenanceWkr	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 janitor cleaning a school building in tax year 2010. The firm's business is described as a cleaning company.

The firm's response was signed by the owner/manager. The firm's business is described as a commercial janitorial cleaning service. The worker performed commercial janitorial services as an independent contractor as outlined in the contract.

Both parties indicate that the worker completed an application for this job.

According to the firm, the worker was not given training or instructions; the worker was provided with the scope of work which was approved by the customer. The firm responded that the worker determined the methods by which the services were performed. Any problems or complaints encountered by the worker were directed to the 'Commercial Cleaning Services Account Manager'. The services were rendered at the firm's customer location. The firm indicated the worker was not required to perform the services personally; the worker would hire and pay for helpers/substitutes and the firm's approval was not required.

The worker stated that he was given specific training and instructions and a tour of the building from the supervisor of the firm. The job assignments and the methods by which the worker's services were performed were determined by the firm. Any problems or complaints encountered by the worker were directed to the firm for resolution. The worker performed his services at the customer location. The worker stated he was required to perform the services personally; any additional personnel were hired and paid by the firm.

The firm responded that nothing was provided by the firm with regards to supplies, equipment, or materials. It was unknown to the firm as to anything the worker may have furnished. The worker indicated that the firm provided a vacuum and cleaning supplies and that he furnished nothing. Both parties concurred that the worker did not lease equipment, space, or a facility. The firm stated the worker was paid monthly according to the contract; the worker responded that he was paid an hourly wage. The firm and worker agreed the customers paid the firm and that the worker was not covered under the firm's workers' compensation insurance policy. The firm indicated the worker was liable for damages caused by his work or negligence; the worker disagreed and stated he was not at risk for a financial loss in this work relationship. The firm responded that the level of payment for services rendered or products sold was agreed to by the firm and worker. The worker stated he did not establish the level of payment for the services rendered or product sold.

The firm and worker acknowledged that there were no benefits extended to the worker and that either party could terminate the work relationship with out incurring a liability or penalty. The worker indicated he was not performing same or similar services to others during the same time frame; this was unknown to the firm.

The firm provided copy of the independent contractor agreement, which provided the following:

- Worker to provide janitorial services described in 'exhibit 1' (not attached)
- Compensation referred to in Exhibit A = \$725/month = annual income of \$8700; and worker to be responsible for payment of all taxes
- Contractor to provide liability insurance – no copy submitted
- Non-competition clause for period of one year

In addition, copies of the Affidavit of Exempt status under worker's compensation (does not identify firm), Exempt status Fact Sheet, Independent Contractor Checklist, and Form W-9 were submitted by the firm.

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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.

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.

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.

the firm's 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.