

# SS-8 Determination—Determination for Public Inspection

Occupation 03PMW.124 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 her work status as a school janitor in tax years 2013 through 2015. Her duties included cleaning classrooms, bathrooms, hallways, stairwells, and throwing out all trash. The firm's is described as independent private school.

The firm's response was signed by the Executive Director. The firm's business is described as a school. The worker performed services as a freelance cleaner.

According to the firm, the worker was not provided any training or instructions. The worker's job assignments were clarified during the bidding process. The worker determined the methods to be used to perform the job duties. Any problems encountered by the worker were reported to executive director and school secretaries. The worker's services were rendered on the school premises. The firm provided the worker with the keys to the school. The worker was not required to perform the services personally; the worker hired and paid for helpers or substitutes.

The worker responded that she was given specific instructions on what to clean and how often and which cleaning supplies and equipment to use. The job tasks came from the firm via notes, text messages, and verbally. 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 services were rendered at the school, Monday through Friday, after school hours. She stated that she was required to perform the services personally.

Both parties confirmed the firm provided all cleaning supplies. The worker furnished nothing; she did not lease equipment and did not incur expenses in the performance of the job. The firm responded that the worker requested the firm provide all necessary supplies and equipment. The firm indicated the worker was paid piecework/daily service. The worker stated she was paid hourly. A letter written by the firm in 2013 and then again in 2014 verified her 5-day a week job and the amount paid per week; it was noted that her pay had increased \$150 per week. The worker was not covered under the firm's workers' compensation insurance policy. The worker indicated that she was not at risk for a financial loss in this work relationship. The worker and firm did not agree as to which party in this work arrangement 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 responded that she was not performing same or similar services for others during the same time frame; the firm disagreed.

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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.

A continuing relationship between the worker and the person or persons for whom the services are performed indicates that an employer-employee relationship exists. A continuing relationship may exist where work is performed in frequently recurring although irregular intervals.

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.

The fact that the person or persons for whom the services are performed furnish significant tools, materials, and other equipment tends to show the existence of an employer-employee relationship.

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.

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. 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.