

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

Occupation 03PMW.126 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**

Information provided indicates the firm does auto trim and upholstery for boats, ATVs, RVs, custom motorcycle seats, convertible tops, sunroof repair etc. The worker performed upholstery services for the firm. The firm contends the worker had been employed three times prior to January 2015. He had quit his employment without notice each time. He had been replaced by another employee at the time of his third departure. The worker contacted the firm in early 2015 and wanted work to perform. It was agreed he would work jobs on a subcontract basis and would be paid by the job at the end of each week. He would be paid thirty-five percent of the job proceeds less materials, which he used such as vinyl cloth materials, glue and convertible tops. The firm indicated he had total control over the hours he worked at these contracted jobs. He had a key to the shop which the firm rented. The worker could come and go as he pleased. He also took off certain days as he desired. No training was given as he previously worked there. He worked for other individuals and often brought the projects he was working on to be completed on his premises. They issued a Form 1099-MISC for 2015. The firm stated work assignments were made by the firm on projects on an as needed basis. The worker is responsible for resolving any customer complaints. No written reports were necessary. The firm indicated the work was performed on the firm premises and locations. The firm stated supplies needed to perform the subcontract work were deducted by the firm from the subcontractor's settlement check. If there were no projects he didn't work. The firm provided a note from the worker left in their door January 2016 stating he would no longer provide subcontract services. This shows he was fully aware of the sub-contract work relationship.

The worker stated he has worked full time for the firm since 2007 as an employee of the firm. The firm reported income earned on Form W-2 up until 2014. There had been a break in service. When the worker returned to the firm the firm switched him to a subcontract basis and issued Form 1099-MISC. The worker indicated there had been no changes in services. The worker stated he was originally paid by the hour plus commissions, then straight commissions. The firm had stated he no longer wanted to keep up with his taxes, so he increased his commissions and reported the income on Form 1099-MISC. The worker indicated he was scheduled to work from seven am to five pm. Those hours were in addition to the amount of overtime he worked during the year. Most services were performed on the firm's premises. He performed his services personally. The worker indicated the firm provided all equipment, supplies and materials, as well as the property location. He provided small items, scissors, hardware, markers etc. He was guaranteed two hundred a week, and paid on commissions. Cash advances and bonuses were given. Either party could terminate without incurring a penalty or liability. He indicated he did not perform similar services for others. The worker stated he quit in January 2016 for not being paid for services performed.

The question of whether an individual is an independent contractor or an employee is one that is determined through consideration of the facts of a particular case along with the application of law and regulations for worker classification issues, known as "common law." Common law flows chiefly from court decisions and is a major part of the justice system of the United States. Under the common law, the treatment of a worker as an independent contractor or an employee originates from the legal definitions developed in the law and it depends on the payer's right to direct and control the worker in the performance of his or her duties. Section 3121(d)(2) of the Code provides that the term "employee" means any individual defined as an employee by using the usual common law rules.

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.

In determining whether an individual is an employee or an independent contractor under the common law, all evidence of both control and lack of control or independence must be considered. We must examine the relationship of the worker and the business. We consider facts that show a right to direct or control how the worker performs the specific tasks for which he or she is hired, who controls the financial aspects of the worker's activities, and how the parties perceive their relationship. The degree of importance of each factor varies depending on the occupation and the context in which the services are performed.

Therefore, 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.

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## Analysis

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### ANALYSIS

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.

If a worker must perform services in the order or sequence set by the person or persons for whom the services are performed, that factor shows that the worker is not free to follow the worker's own patterns of work. Often, because of the nature of an occupation, the person or persons for whom the services are performed do not set the order of the services or set the order infrequently. However, if the person or persons retain the right to control the order or sequence of the work, this is sufficient to indicate an employer-employee relationship.

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. Lack of significant investment by a person in facilities or equipment used in performing services for another indicates dependence on the employer and, accordingly, the existence of an employer-employee relationship. 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. Also, if the firm has the right to control the equipment, it is unlikely the worker had an investment in facilities.

We have applied the above law to the information submitted. As is the case in almost all worker classification cases, some facts point to an employment relationship while other facts indicate independent contractor status. The determination of the worker's status, then, rests on the weight given to the factors, keeping in mind that no one factor rules. The degree of importance of each factor varies depending on the occupation and the circumstances.

Evidence of control generally falls into three categories: behavioral control, financial control, and relationship of the parties, which are collectively referred to as the categories of evidence. In weighing the evidence, careful consideration has been given to the factors outlined below.

Factors that illustrate whether there is a right to control how a worker performs a task include training and instructions. In this case, you retained the right to change the worker's methods and to direct the worker to the extent necessary to protect your financial investment.

Factors that illustrate whether there is a right to direct and control the financial aspects of the worker's activities include significant investment, unreimbursed expenses, the methods of payment, and the opportunity for profit or loss. In this case, 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.

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 was not engaged in an independent enterprise, but rather the services performed by the worker were a necessary and integral part of your business. Both parties retained the right to terminate the work relationship at any time without incurring a liability.

### 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. The firm determined all work assignments on a project by project basis. All services were performed under the firm's business name. The customer paid the firm for the completed projects, based on the rates determined by the firm. The worker had previously performed the same services from 2007 through 2014 as an employee of the firm. He continued to perform the same services.