

# SS-8 Determination—Determination for Public Inspection

Occupation 03TRA.174 Laborer/Trades	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 construction laborer for the firm with duties that included flooring, painting, trim, and drywall in tax years 2013 through 2014. The firm's business is described as construction and painting.

The firm's response indicates the firm's business is paint and remodeling. The worker performed services as a subcontract painter.

According to the firm, the worker was not given training or instructions. The job was given out to bid on. The firm indicated the worker determined methods by which the job was performed and handled any problems he encountered. The work was performed at the customers' location. The worker not required to perform the services personally; any additional helpers or substitutes were hired and paid by the worker. The firm provided the paint only; the worker incurred expenses for everything, but the paint. The firm responded that the worker was paid piecework and lump sum. The firm allowed the worker advances against pay. The customers paid the firm. The firm determined the level of payment for services rendered or products sold. There were no benefits extended to the worker. Either party could terminate the work relationship without incurring a liability or penalty. The firm ended the work relationship.

The worker stated he was not given specific training; but, that instructions were given daily based on the job assignment from the firm. The firm determined the methods by which the worker's services were performed. The worker contacted the firm if any problems or complaints arose. The worker's services were rendered Monday through Saturday from 7 am to 3 pm, at the customer's location. The worker responded that he was not required to perform the services personally; any additional personnel were hired and paid by the firm. The firm provided drills, brushes, nail guns, hammers, tape measures, and t-shirt with the firm's logo, and etc.; the worker furnished nothing, he did not lease equipment, facilities, or space, and did not incur expenses in the performance of the job. The worker indicated he was paid an hourly wage; the customers paid the firm. The worker acknowledged that he was not at risk for a financial loss in this work relationship and the firm established the level of payment for services provided or products sold. He was not entitled to benefits. 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. He confirmed that the firm terminated the work relationship.

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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 right to discharge a worker is a factor indicating that the worker is an employee and the person possessing the right is an employer. An employer exercises control through the threat of dismissal, which causes the worker to obey the employer's instructions. An independent contractor, on the other hand, cannot be fired so long as the independent contractor produces a result that meets the contract specifications.

The firm's statement that the worker was an independent contractor pursuant to a verbal 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.