

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

Occupation 04FSC.33 Overseer	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 submitted a request for a determination of worker status in regard to services performed for the payer from January 2010 to December 2015 as a lead foreman. The work done by the worker included general maintenance and residential construction for the payer's customers. The payer issued the worker Form 1099-MISC for the years in question. The worker filed Form SS-8 as he believes he erroneously received Form 1099-MISC. In 2000, the worker was hired and classified as an employee. In December 2009, the worker was informed he would now be classified as a 1099. The services performed by the worker did not change; however, he lost employment benefits.

The payer's response stated it is a maintenance repair business. The worker was engaged to perform general maintenance repair. The worker was previously engaged by a contracting corporation which was closed as it was unable to do large jobs. Small contracts for maintenance were accepted only. Upon closing the corporation, the worker accepted work as an independent to enable him to pursue work elsewhere. The worker also independently worked for and received payment from homeowners without help from the payer. Services were performed under a verbal agreement.

The payer stated it did not provide specific training or instruction to the worker. Work orders were received by property owners. The property owners determined the methods by which assignments were performed and were contacted for problem resolution. Reports and meetings were not required. The payer provided copies of invoices prepared by the worker. The payer's 2010 payment report evidences it reimbursed the worker for materials. Each Monday the commissary is closed to patrons. The worker worked at the commissary three half-days and one full-day each month. Various odd jobs were performed based upon availability. 80% of the worker's time was spent at the commissary; 20% at various odd jobs. The payer required the worker to personally perform services. The payer hired substitutes or helpers with clearance by the property owner. The main company reimbursed the payer for payment to substitutes or helpers. The worker stated the payer provided specific instruction as to where, when, and how the work was to be done. The worker received assignments by phone or text from the payer. The payer determined the methods by which assignments were performed and assumed responsibility for problem resolution. The worker's routine consisted of reporting to the job site when informed by the payer. The payer showed up with materials and tools and told the worker what to do. Services were performed at the commissary on Mondays and on an emergency basis. Services were performed at customer locations the rest of the week.

The payer stated it provided its own tools. The worker provided his own tools. The main company provided all materials needed. The worker did not lease equipment, space, or a facility. The worker incurred the expense of maintaining his own tools. Customers paid the payer. The payer paid the worker as invoiced; a drawing account for advances was not allowed. The payer did not carry workers' compensation insurance on the worker. The worker did not incur economic loss or financial risk. The worker established the level of payment for the services provided. The worker stated the payer provided all tools, supplies, and materials. The worker provided his vehicle. The payer paid him an hourly rate of pay. The payer established the level of payment for the services provided.

Benefits were not made available to the worker. The work relationship could be terminated by either party without incurring liability or penalty. The payer stated the worker performed similar services for others; the payer's approval was not required for him to do so. There was no agreement prohibiting competition between the parties. It is unknown if the worker advertised. The payer represented the worker as an independent to its customers. The work relationship ended when the worker walked off the job. The worker stated the payer's approval was required for him to perform similar services for others. The worker was only allowed to work under the payer's direction; no side jobs were allowed. The worker did not advertise. The payer represented him as an employee to its customers. The work relationship ended when the worker was fired.

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## Analysis

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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.

Section 31.3121(d)-1(a)(3) of the regulations provides that if the relationship of an employer and employee exists, the designation or description of the parties as anything other than that of employer and employee is immaterial. Thus, if an employer-employee relationship exists, any contractual designation of the employee as a partner, coadventurer, agent, or independent contractor must be disregarded.

Therefore, the payer's statement that services were performed 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.

If the services must be rendered personally, presumably the person or persons for whom the services are performed are interested in the methods used to accomplish the work as well as in the results. In this case, the payer required the worker to personally perform services. Furthermore, the services performed by the worker were integral to the payer's business operation. The payer provided work assignments by virtue of the customers served and it collected customer payment for services performed. These facts evidence the payer retained the right to direct and control the worker to the extent necessary to ensure satisfactory job performance in a manner acceptable to the payer. Based on the worker's past work experience and work ethic the payer may not have needed to frequently exercise its right to direct and control the worker; however, the facts evidence the payer retained the right to do so if needed.

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 payer's customer for poor work, the payer shares the risk of such loss. Control of the payer over the worker would be necessary in order to reduce the risk of financial loss to the payer. The opportunity for higher earnings or of gain or loss from a commission arrangement is not considered profit or loss. In this case, the worker did not invest capital or assume business risks. 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. As acknowledged by the payer, the worker did not incur economic loss or financial risk. Based on the hourly rate of pay arrangement, the worker could not realize a profit or incur a loss.

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 the payer's business. Both parties retained the right to terminate the work relationship at any time without incurring a liability. There is no evidence to suggest the worker performed similar services for others as an independent contractor or advertised business services to the general public during the term of this work relationship. The classification of a worker as an independent contractor should not be based primarily on the fact that a worker's services may be used on a temporary, part-time, or as-needed basis. As noted above, common law factors are considered when examining the worker classification issue.

Based on the above analysis, we conclude that the payer 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 payer can obtain additional information related to worker classification online at [www.irs.gov](http://www.irs.gov); Publication 4341.