

# SS-8 Determination—Determination for Public Inspection

Occupation 04MAN.49 Manager	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 firm is in business as a residential apartment complex. As the worker provided services to the firm's prior owner, the firm engaged the worker to provide information concerning day-to-day operation of the apartment building; provide tenant relations; and train new management during the transition phase from purchase to new management. The firm reported the worker's remuneration on Forms 1099-MISC for 2013 and 2014.

Information from the parties supports that the firm relied upon the worker's prior training and experience to perform his services. If problems or complaints occurred, the worker contacted the firm for resolution; he and the new staff were responsible for their resolution. The worker created his daily routine and work schedule. He performed his services on-site and through weekly conference calls. The worker was required to perform his services personally. If additional personnel were needed, the firm was responsible for hiring and compensating them.

The firm provided the property. It paid the worker a bi-weekly salary. The worker did not lease space or equipment, or incur expenses in the performance of his services. Customers paid the firm directly at prices established by the firm. The firm did not cover the worker under workers' compensation. Neither party indicated an investment by the worker in the firm or a related business, or the risk of the worker incurring a financial loss beyond the normal loss of compensation.

The firm did not make benefits available to the worker. It did not prohibit him from providing similar services for others during the same time period. The worker provided his services under the firm's name. Both parties reserved the right to terminate the work relationship at any time without incurring a penalty or liability, and in fact, the firm terminated the work relationship when the firm no longer required the worker's services.

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## Analysis

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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 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.

Factors that illustrate whether there was a right to control how a worker performed a task include training and instructions. In this case, while the firm relied upon the worker's training to perform his services, it is only reasonable to assume that it retained the right to change the worker's methods and to direct the worker to the extent necessary to protect its financial investment and ensure its customers' satisfaction. The worker's schedule was dependent upon the firm's needs. He performed his services on the firm's premises. The worker was required to perform his services personally, meaning he could not engage and pay others to perform services for the firm on his behalf. 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. These facts show that the firm retained behavioral control over the services of the worker.

Factors that illustrate whether there was 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. "Profit or loss" implies the use of capital by a person in an independent business of his or her own. 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 firm paid the worker on a bi-weekly salary basis. In such instances, the firm assumes the hazard that the services of the worker will be proportionate to the regular payments. Workers are assumed to be employees if they are guaranteed a minimum salary. These facts show that the firm retained control over the financial aspects of the worker's services.

Factors that illustrate how the parties perceived 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 were part of the service recipient's regular business activities. In this case, the worker performed his services under the firm's name. The worker was not engaged in an independent enterprise, but rather the property management and training services performed by the worker were a necessary and integral part of the firm's business as a property owner. 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. The worker could have performed similar services for others during the same time period; however, it is possible for a person to work for a number of people or firms concurrently and be an employee of one or all of them. Although the firm did not provide benefits to the worker, it terminated the work relationship without incurring a liability. 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. These facts show that the firm retained control over the work relationship and services of the worker.

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.