

# SS-8 Determination—Determination for Public Inspection

Occupation 04MAN.110 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 the business of internet automotive advertising under the above names as well as Trader Interactive and [REDACTED]. The worker was engaged by the firm to provide general management, advising, and consulting services. The firm did not withhold taxes from the worker's remuneration in 2010 through 2015.

Information from the parties supports that the firm relied upon the worker's prior training and experience to perform his services. The firm provided the worker with its expectations, and occasional assignments to complete specific tasks. If problems or complaints occurred, the worker contacted the manager of the firm for resolution. The firm allowed the worker flexibility in his schedule. The firm stated that the worker performed his services on-site and off-site. The worker attended weekly update meetings. He was required to perform his services personally.

The firm provided the office equipment and supplies, and the property. The worker provided his cell phone. He incurred ordinary expenses such as commuting costs, business lunches, and home internet costs. The firm paid the worker on a commission basis; the firm did not guarantee a minimum amount. It did not cover him under workers' compensation. Customers paid the firm directly at prices established by the firm. 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 recruited the worker. It did not make benefits available to him. The firm stated that the worker provided similar services for others during the same time period. There is no evidence presented showing the worker advertised his services or maintained a business listing. Both parties reserved the right to terminate the work relationship without incurring a penalty or liability, and in fact, the firm terminated the work relationship when the worker's services were no longer needed.

---

## Analysis

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, the firm relied upon the worker's prior training and experience to perform his services. 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. The firm was responsible for resolving any problems or complaints, showing it retained the right to change the worker's methods and to direct the worker to the extent necessary to protect its financial investment. The firm stated that the worker had the ability to perform his services off-site. Work done off the premises of the person or persons receiving the services, such as at the office of the worker, indicates some freedom from control. However, this fact by itself does not mean that the worker is not an employee. 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 commission basis. The opportunity for higher earnings or of gain or loss from a commission arrangement is not considered profit or loss. 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 on a continuing basis. He performed his services under the firm's name. 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. 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.