

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

Occupation 05ITE.60 Instructor/Teacher	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**

It is our usual practice in cases of this type to solicit information from both parties involved. Upon the submission of the Form SS-8 from the worker, we requested information from the firm concerning this work relationship. The firm responded to our request for completion of Form SS-8.

From the information provided the firm is in the business of providing gymnastics and cheerleading instruction and the worker was engaged as a cheerleading and tumble coach and instructor. The worker's duties included teaching kids how to tumble up to intermediate level, coach all-star cheerleading, and assisting with cleaning. The firm states all of the worker's services were scheduled by her and the coaches. The firm believes the worker was independent contractor because she made her own schedule and worked the times she made. The firm states the worker's schedule changed often.

The firm provided no training to the worker. The worker was required to obtain her certification through [REDACTED] and/or [REDACTED] and this certification was required for her field of work no matter where she worked. The worker was aware of the hours the firm's facility was open and the firm states the worker then made her schedule based on her time allowed and other coaches and the classes/practices at the gym. The worker was required to personally perform her services and the firm states the worker determined how she performed her services. The worker was required to notify the firm if any problems or complaints arose for their resolution. The worker was not required to submit reports to the firm. The worker's routine consisted of arriving to coach classes which were usually one (1) hour each and team coaching lessons which was usually two (2) hours each. The worker would set up equipment and clean up when done. The firm states the worker had a key to their facility and could come and go as she scheduled. The worker performed her services at the firm's premises. The firm states they would have meetings for the coaches several times a year (about 3) that the worker would attend. The firm states they were responsible for the hiring and paying of substitutes or helpers.

The firm provided the facility, mats, spring floor and stereo to the worker in order to perform her services. The worker provided the music, educational materials, routines, and a uniform which had to be the gym colors. The firm states the worker could give private lessons at their gym and outside of her scheduled hours. The firm states the worker incurred expenses for her uniform, general office supplies, mileage, and upkeep on instruction & education. Once the worker took the safety certification with [REDACTED] the firm reimbursed the worker after six (6) months because it lowered the liability insurance at their gym. The clients paid the firm for services rendered by the worker and the firm paid the worker at an hourly rate. The firm states they established the level of payment of services provided. The firm states the worker could incur a loss if a child was injured while under her supervision, as she could be sued.

The worker was not eligible for employee benefits. The worker did not perform similar services for others. The firm states the worker advertised her services on third parties websites and verbally. The worker is known as a coach at the firm's facility. The firm states the worker does private lessons and squad instruction outside of their facility under her own name.

The firm states they would put trial kids in a class the worker had room in and the worker would sell her services and try to get them to sign up. The firm states the worker would solicit private lessons that fees were paid directly to her. The firm states the worker would then pay them a rental fee.

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## Analysis

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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, the worker was required to personally perform services her services and she could not send another worker in her absence. If a worker must personally perform her services rather than engaging others to act in her absence, presumably the person for whom the services are performed is interested in the methods used to accomplish the work as well as in the results.

The worker was experienced in this line of work and did not require training or detailed instructions from the firm. The need to direct and control a worker and her services should not be confused with the right to direct and control. The worker provided her services on behalf of and under the firm's business name rather than an entity of her own. The firm was responsible for the quality of the work performed by the worker and for the satisfaction of their clients. This gave the firm the right to direct and control the worker and her services in order to protect their financial investment, their business reputation, and their relationship with their clients.

While the firm provided the worker with freedom of action as to when she performed her services, this in and of itself does not determine the worker's status as an independent contractor. The whole relationship needed to be analyzed to determine the worker's correct employment tax status. An important factor of determining a worker's status is who had the contractual relationship with the client and whom did the client pay. In this case, that relationship was between the firm and their clients.

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 the firm's business. The worker had the ability to perform services for others and perform services on her own away from the firm's premises. In this line of work it's not unusual for instructors to perform services out on their own. In that capacity, they may very well be self-employed as they are performing services under their own name, charging their own prices, and providing all equipment and supplies. However, those services are not the issue in this case. This determination is focusing on and determining the employment tax status of the worker performing services as it pertains to the firm and the worker. It is possible for someone to be self-employed and to perform services for a business as an employee. There was no evidence presented or found in this investigation that the worker in this case leased a space or perform her services under her own name at the firm's premises and charging her own prices. When there is a formal and valid lease agreement and the worker must pay a rental fee whether she works or collects fees or not, an opportunity to incur a loss is present. That did not happen in this case.

If a firm has to make a worker "understand" or "agree to" being an independent contractor (as in a verbal or written agreement or the filing of a Form W-9), then the worker is not an independent contractor. An individual knows they are in business for themselves offering their services to the public and does not need to be made aware of, understand, or agree to be an independent contractor.

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, co-adventurer, 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.

Both parties retained the right to terminate the work relationship at any time without incurring a liability.

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.