

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

Occupation 05ITE.61 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**

Information provided indicates the firm is fitness/training facility. The worker performed services for the firm as a personal trainer for tax years 2012 through 2015. Both parties have provided a copy of the contract. The firm states the worker must have prerequisite professional qualifications. Training was provided only for use of company computer programs used for fitness training. Work assignments are given when gym members request services of a personal trainer, walk-ins or direct referrals from clients. The trainer determines how they trained. They reported to the CEO of the company for any issues or problems. Bi-monthly session reports and client session records are given, for payment purposes only. Medical history updates for GYM members for safety procedures are required. The firm stated the schedule was determined by the trainer, the firm did not schedule hours or require a set schedule. No meetings were required. Services were to be performed personally. The firm provided all gym equipment, medical history forms, testing equipment etc. The worker may have provided other equipment they deemed they needed. Nothing was leased. They provided their own liability insurance. The worker was paid on a commission basis. The customer paid the firm. Client training fees are set by the firm. The trainer may set fees for any new services. Either party could terminate the work relationship without incurring a penalty or liability. The worker quit with a 30 day notice given.

The worker indicated she was given fitness assessment instructions. All clients were assigned to a trainer by the firm. The owners of the firm controlled all client assignments. The workouts were prepared by the trainers for specific clients were required to be kept in the facility available to the owners. The worker stated the trainer set hours based on client availability. Services were to be provided personally. The worker was required to wear company logo when training. The firm provided the facility, equipment and clients. The worker stated she was paid by the hour, the clients paid the firm. She agreed she did not lease equipment or facility space. Either party could terminate the work relationship without incurring a penalty or liability. She stated she was represented as an employee of the company. The worker agreed she gave notice. The worker also provided a copy of the company business card, which represented her as their personal trainer.

The contract gives the position description the worker was required to follow, to include providing an explanation of the firm's services, to provide a FREE initial consultation and fitness assessment, provide periodic reassessments, wear company issued T-shirts, keep all facility and equipment clean. The worker was to be paid 60% of each session fee (if they complete forty sessions they get 65%, 70 sessions 70%) Worker would be paid every two weeks. Worker would also be reimbursed for any reasonable and authorized expenditure are agreed to in advance by the parties and approved in writing in advance by the CEO, with receipts provided. The firm retained the sole right to set client charges and fees. Failure to comply will be considered a breach of the contract. The firm was responsible for all billing and collections. There was also a non-compete clause (Section 8) during the services and for a period of six months after the termination the worker could not solicit or contact the firm's clients, or engage in a business within 10 miles of the firm.) The worker could pay the firm 30% of the amount the client has paid to the company, if that client wished to follow the worker.

The question of whether an individual is an independent contractor or an employee is one that is determined through consideration of the facts of a particular case along with the application of law and regulations for worker classification issues, known as "common law." Common law flows chiefly from court decisions and is a major part of the justice system of the United States. Under the common law, the treatment of a worker as an independent contractor or an employee originates from the legal definitions developed in the law and it depends on the payer's right to direct and control the worker in the performance of his or her duties. Section 3121(d)(2) of the Code provides that the term "employee" means any individual defined as an employee by using the usual common law rules.

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.

In determining whether an individual is an employee or an independent contractor under the common law, all evidence of both control and lack of control or independence must be considered. We must examine the relationship of the worker and the business. We consider facts that show a right to direct or control how the worker performs the specific tasks for which he or she is hired, who controls the financial aspects of the worker's activities, and how the parties perceive their relationship. The degree of importance of each factor varies depending on the occupation and the context in which the services are performed.

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## Analysis

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We have applied the above law to the information submitted. 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, you retained the right to change the worker's methods and to direct the worker to the extent necessary to protect your financial investment. In the instant case, the firm maintained control over the clients, and assigned at their discretion. The services were performed solely for the firm, under the firm's business name. The worker(s) were prohibited from working for or at another facility while working for the firm (section 8 and 9 of said contract). The worker was required to wear firm apparel and complete client assessment forms to be held at the facility, as they were the firm's 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. The firm owned the facility and all equipment utilized in the services performed. Liability insurance or additional exercise equipment of their choosing, would be deemed tools of the trade and not a business/financial investment. The worker was paid on a commission basis on an ongoing biweekly basis. The firm determined the rates, and packages charged to their clients (see their webpage). The contract states the firm retains the sole right to set fees, and did the billing and collection. They also reserved the right to write off any fees not collected from a client in 60 days, and expected the workers to be fine with that. If the worker did not comply with the company's pricing policies, it was terms for dismissal.

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

## 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.