

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

Occupation 05ITE.66 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**

125988

The worker initiated the request for a determination of his work status as a music instructor for 2013 through 2015; he does indicate he rendered services in 2011 and 2012 and continues to provide services in tax year 2016. The worker stated he was a previous client who completed an application in order to obtain the job. The firm's business is described as a private school of music and dance classes for children and adults.

The firm's response was signed by [REDACTED] owner. The firm's business is described as private music lessons. The worker performs services as a guitar instructor.

The firm provided a copy of Independent Teacher Contract – (music): the school will provide facilities necessary and will be responsible for attracting and arranging for the attendance of students at the facility; school will be responsible for setting and collecting lesson fees from students; students shall be considered the property of the school for the duration of the agreement and 12 months following termination of the agreement; the teacher agrees to provide the school with a list of days/hours teacher is available to work; teacher must provide 30 days notice of any change to days or hours the teacher is available to work; teacher agrees to a payment of \$X/hour student and \$Y/ half hour student; teacher will complete a weekly attendance sheet.

According to the firm, there were no specific training or instructions given to the worker. The worker provides an available appointment time and client seeking that time sets up a weekly appointment. The firm indicated the worker has sole control as to the methods by which the services are performed. The worker in this case was not identified on the firm's website, however, there is a choice of more than one teacher to fit the personality and learning style of the interested student. The firm's instructors formulate a curriculum to meet the student's individual needs and desires. The worker and client work on problems about the services; however, the client works with firm if a change in instructor is needed. The worker submits a client attendance report to be paid for services rendered. The firm responded that the hours vary from one client a day to as many as 6 or 7 clients. The services are performed on the firm's premises. The worker is required to perform the services personally; substitutes can be arranged by the firm or worker, however, the worker usually reschedules the class. The firm would pay for a substitute for services when needed.

The worker stated the manager assigns students, a room to use for the lesson, and when to be there, as the firm controls the overall class schedule. Any problems or complaints encountered by the worker are directed to the firm for resolution. The worker's services are rendered at the firm's location with the general manager assigning the students, class times, and classrooms. His classes are usually the same each week – Monday through Saturday. The worker agreed that he is was required to perform the services personally with the additional personnel being hired by and paid by the firm.

The firm response is that the firm provides the premises or room for instructing, with the worker providing instruments, music, electronic devices, books, and accessories that the worker deems necessary. The worker does not lease equipment, space, or a facility. The customer pays the firm; the firm pays the worker as denoted in the contract. According to the firm's website, the firm is advertising music and dance lessons for a per-month tuition, per week per ½ or 1 hour session, with all fees payable by pre-authorized debit or credit card at time of registration. The firm responded that the worker does not establish the of level payment for services provided or products sold.

The worker indicated the firm provides the classroom, music stands, and other instruments; the worker furnishes his personal guitar. He concurred that he does not lease equipment and does not incur expenses in the performance of the job. He acknowledges he is paid an hourly wage, with the customer making payment to the firm; the worker was not sure if he was covered under the firm's workers' compensation insurance policy. He stated that he is not at risk for a financial loss in this work relationship unless there was damage to his personal guitar. The firm establishes the level of payment for services provided or products sold.

Both parties agree that no benefits are extended to the worker and that either party could terminate the work relationship without incurring a liability or penalty. The worker responded he is/has not performing same or similar services for others during the same time frame.

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## Analysis

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The firm provided a copy of Revenue Ruling 70-338, 1970-1 C.B. 200, January 1970 re: teachers instructing regular classes at a music conservatory.

A worker who is required to comply with another person's instructions about when, where, and how he or she is to work is ordinarily an employee. This control factor is present if the person or persons for whom the services are performed have the right to require compliance with instructions. 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.

A continuing relationship between the worker and the person or persons for whom the services are performed indicates that an employer-employee relationship exists. A continuing relationship may exist where work is performed in frequently recurring although irregular intervals. Payment by the hour, week, or month generally points to an employer-employee relationship, provided that this method of payment is not just a convenient way of paying a lump sum agreed upon as the cost of a job. In such instances, the firm assumes the hazard that the services of the worker will be proportionate to the regular payments. This action warrants the assumption that, to protect its investment, the firm has the right to direct and control the performance of the workers. Also, workers are assumed to be employees if they are guaranteed a minimum salary or are given a drawing account of a specified amount that need not be repaid when it exceeds earnings.

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 firm's customer for poor work, the firm shares the risk of such loss. Control of the firm over the worker would be necessary in order to reduce the risk of financial loss to the firm. The opportunity for higher earnings or of gain or loss from a commission arrangement is not considered profit or loss.

Your 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.

In the ruling the instructor provides most of the students, the conservatory's responsibility is the collection of fees, the students enroll as a result of the teacher and not the efforts of the conservatory. As stated in the ruling the conservatory serves in more of an administrative capacity than an employer. We have considered the information provided by both parties and have applied the law to this work relationship. In this case, the firm retains the right to change the worker's methods and to direct the worker to the extent necessary to protect its financial investment and business reputation and to ensure its customers' satisfaction and that its contractual obligations are met. The worker provides services that are integral to the firm's business objectives. The firm provides the venues, advertises the aspects (dance or music), and establishes and collects the fees for the lessons. In comparing the revenue ruling to the instant case, the firm in this case will provide the facilities necessary and will be responsible for attracting and arranging for the attendance of students at the facility, the firm is responsible for setting and collecting lesson fees from students, the students shall be considered the property of the school for the duration of the agreement and 12 months following termination of the agreement. The firm in this case does not advertise the worker per se; he is one of multiple instructors, who is paid an hourly rate based on the number of classes scheduled by the firm to meet the needs of the interested client(s). The worker is not operating a separate and distinct business; the worker does not have an investment of capital or assume business risks, and therefore, he does not have the opportunity to realize a profit or incur a loss as a result of the services provided. 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. In this case, the worker is not engaged in an independent enterprise, but rather the services performed by the worker are a necessary and integral part of the firm's business.

## CONCLUSION

Based on the above analysis, we conclude that the firm has the right to exercise direction and control over the worker to the degree necessary to establish that the worker is a common law employee, and not an independent contractor operating a trade or business.