

# SS-8 Determination—Determination for Public Inspection

Occupation 05ITE.88 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

The firm is in the business of providing athletic and health/fitness training for individuals and groups, as well as nutritional coaching and injury reconditioning. The worker was engaged as a personal trainer and coach. He received a Form 1099-MISC for his services in 2013, 2014 and 2015. He continued to provide services in 2016 as well. There were written agreements.

Only the worker indicated that he was provided with instructions on how to set the schedule and how to deal with clients. The worker noted that he received his work assignments from the firm though the firm noted that the worker chose who to train and set his own schedule. Both parties agreed that the worker determined the methods by which the assignments were performed, with the worker including that the firm also determined the methods as well. Only the worker noted that the firm would be contacted if any problems or issues arose. Both parties agreed that the worker was to report his hours worked to the firm; the worker submitted any signed client service agreements as well. Both agreed that there was no schedule or routine and agreed that the worker provided his services at the firm's premises. Only the worker mentioned monthly staff meetings. The worker indicated that he was to provide the services personally with the firm hiring and paying any substitute workers.

The firm provided the premises and all equipment. The firm noted that under the terms of the agreement, the worker had the right to use the facilities. The worker noted that he was paid an hourly rate and had no other economic risk; the firm referred to the contract which indicated an hourly rate dependent on the total number of hours worked in a week. Both parties agreed that the customer paid the firm. Both also agreed that the firm established the level of payment for services when the worker worked at its facility.

Both the firm and the worker agreed that there were no benefits though the worker mentioned a Christmas bonus and birthday gift. Either party could terminate the relationship without incurring a liability. The worker did not perform similar services for others. Both parties agreed that there was a noncompete clause in place and that that the relationship had ended.

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## Analysis

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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. The relationship of the worker and the business must be examined. 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 should be considered. 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.

Factors that illustrate whether there is a right to control how a worker performs a task include training and instructions. In this case, the firm retained the right to change the worker's methods and to direct the worker to the extent necessary to protect its financial investment. It was the firm that had the investment in the business even though the worker was given considerable latitude in his role as a trainer and in client scheduling. The clients, whether individuals or groups, were 'enrolled' with the firm. Any group training sessions were scheduled by the firm even if based on the worker's availability. The firm provided the facility and the worker worked exclusively for the firm as he was prohibited from providing similar services within the local area. In addition, the worker provided his services on a continuous basis throughout the time period involved. 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. While the worker was allowed to use another trainer from the firm to serve as a substitute trainer to fulfill his schedule obligations, it was the firm that paid the substitute.

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. Again, it was the firm that had the investment in the facility and equipment. The worker simply received an hourly rate of pay. The firm indicated that the worker paid 'rent' on the facility by the firm charging the client a fee, then paid the worker an hourly rate and considered the difference as rent for use of the facility. This was not a set rental fee on which the worker could incur a profit or loss. Rent was not charged if the worker chose not to work. 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. It is acknowledged that the agreement indicated that the worker would be responsible for this 'rent' if the customer did not pay the firm. This never happened.

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. There were no benefits and there were written agreements. The firm's belief 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 indicated that the worker continued his work as a subcontractor as opposed to committing to a new arrangement; however, in *Bartels v. Birmingham*, 332 U.S. 126, 1947-2 C. B. 174, the Supreme Court stated that whether there is an employment relationship is a question of fact and not subject to negotiation between the parties. In other words, the parties cannot simply agree to a certain type of relationship, if the facts support otherwise.

The worker was a personal trainer at the firm's facilities offering training and coaching services to the public. When doing so, the worker was not engaged in an independent enterprise. The worker did not maintain an office or advertise; and in fact, could not hold himself out to the public to provide those services as he was restricted from doing so within the area. His services were part of the necessary activities of the firm's business operations. 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.

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.

Please see Publication 4341 for guidance and instructions for firm compliance.