

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

Occupation 06SCI Scientists	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 worker initiated the request for a determination of his work status as a Senior Scientist, primarily responsible for performing laboratory research and for generating intellectual property to expand the patent portfolio of the firm in tax years 2015 and 2016. He also applied for grant funding on behalf of the firm, met with patent attorneys, corporate attorneys and investment firms on behalf of the firm, in addition to preparing and delivering presentations on behalf of the firm in order to secure additional funding. The firm's business is described as scientific research for the development of new medical devices including surgical tissue sealants and adhesives.

The firm's response was signed by the president. The firm's business is described as biotech startup company to develop a concept for a medical adhesion agent. The worker performed research as a senior scientist technical consultant.

According to the firm, no specific training and instructions were given to the worker. The worker's job assignments were determined by the worker's research methods which he used to accomplish the overall goals. Any problems or complaints encountered by the worker were directed to the firm's CEO or another consultant for resolution. The worker's services were rendered at the firm's laboratory. The worker was required to perform the services personally.

The worker responded that he was given specific training and instructions for task-specific laboratory procedures provided by the firm's Director of R & D (research and development). The worker's job assignments came from the CEO verbally, in person or via phone. The firm (CEO or Director of R & D) determined the methods by which the worker's services were performed and were the persons contacted if there were any problems or complaints that required resolution. The worker's services were rendered 90% of the time at the firm's location, typically Monday through Friday, and some weekends, between 9 am and 5 pm; the remainder of his time he answered emails and phone calls from his home. The worker stated he was required to attend weekly staff meetings with the CEO and Director of R & D and well as off-site meetings with external third parties. He agreed that he was required to perform the services personally; and, any additional personnel were hired and paid by the firm.

The firm and worker acknowledged that the firm provided all laboratory equipment, supplies, chemicals, office and laboratory space, business cards, and access to the firm's email account. The worker furnished nothing; he did not lease equipment, space or facilities, and did not incur expenses in the performance of the job. He was reimbursed for mileage for business-related travel as well as offices supplies, with prior approval and the submission of receipts. The firm paid the worker an annual salary disbursed on a monthly basis, upon receipt of an invoice from the worker for the monthly amount plus any expense reimbursement. The worker was not covered under the firm's workers' compensation insurance policy. Both parties concurred that the worker was not at risk for a financial loss in this work relationship and that the worker did not establish the level of payment for the services provided or products sold.

The worker responded that the benefits extended to him consisted of paid holidays, paid vacations, personal days, and annual bonuses (none were provided); the firm disagreed. Either party could terminate the work relationship without incurring a liability or penalty. The worker was not performing same or similar services for others during the same time frame. The worker was provided with business cards with his name, as a Senior Scientist, and the firm's logo and information. Due to the nature of the work, all research/chemical reactions and experiments were conducted at the firm's premises/laboratory.

Both parties provided a copy of the signed 'job offer letter' which provided the following: he (worker) would be hired as a senior consulting scientist, contingent upon signing the confidentiality, non-disclosure, non-compete and intellectual property rights agreements; \$XXX per year to be paid monthly upon receipt of an invoice, eligible for annual bonuses, (paid in cash or shares), and upon an annual review of his work (by the Director of R & D); expenses to be reimbursed - expense reports must be consistent with company policies; and the individual (worker) warrants that no other contractual or other obligation exists which legally restricts him from performing duties as a consultant; he would be expected to be in the full-time employment of the firm, devoting all of his business time and attention, and efforts to the firm. Copies of the invoices were submitted, and a copy of email traffic regarding the worker's mandatory attendance at meetings, as a professionally salaried employee of the firm.

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## Analysis

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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.

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.

If the work is performed on the premises of the person or persons for whom the services are performed, that factor suggests control over the worker, especially if the work could be done elsewhere. 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.

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.

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 term "significant investment" does not include tools, instruments, and clothing commonly provided by employees in their trade; nor does it include education, experience, or training. Also, if the firm has the right to control the equipment, it is unlikely the worker had an investment in facilities.

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 firm's statement that the worker was a consultant 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.

We have considered the information provided by both parties to this work relationship. 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 and business reputation and to ensure its customers' satisfaction and that its contractual obligations were met. The worker was not operating a separate and distinct business; 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. 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 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.

## 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.