

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

Occupation 03PMW.58 RepairMaintenanceWorker	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 steam cleaning air conditioning/heating units in rooms of hotels, motels, colleges, etc. utilizing equipment installed in vans. The worker performed services for the firm as a cleaning technician under a written agreement. The firm believes the was an independent contractor (IC) because all technicians are paid by the number of units cleaned, the worker signed an agreement that specified he was a contract worker with no insurance coverage/benefits available, no vacation or sick pay benefits, no taxes deducted from his pay and that he would receive a 1099-MISC at the end of the year. The firm states this agreement was also discussed verbally with the worker.

The firm states they provided on-the-job training and instructions to the worker. The worker's work assignments were scheduled through the firm's home office. The firm states they developed the procedures on how to perform the work and they provided the training. The worker was required to personally perform his services and he was required to contact the firm's home office regarding any problem that occurred on the job site. The worker would discuss the problem with the firm and the firm would contact the customer and resolve any issues. The worker was required to submit a Daily Unit Count report to the firm showing the number of units cleaned for a project, a job completion report showing the total units cleaned and additional parts and service performed, and a petty cash report for miscellaneous expenses. The worker's routine was to start at approximately 8 a.m. and perform cleaning services to the firm's clients at the clients' locations until 5 p.m. Occasionally the worker performed his services at the firm's home office doing various tasks in their shop. The worker was not required to attend meetings. The firm states they were responsible for the hiring and paying of substitutes or helpers.

The firm provided the van, cleaning equipment, cleaners/disinfectants, tools, and any miscellaneous parts used on the job to the worker in order to perform his services. The firm also supplied the worker with a per diem meal allowance, a fleet gas card, and petty cash for tools, parts, cleaners, laundry, tolls, car wash expense so he did not incur expenses. The worker was compensated on a piece work basis and he received per diem for meals and a daily base amount for mileage driven over a predetermined limit. The firm provided a debit bank card to the worker for per diem/ advanced funds and withdrawals were permitted every three (3) to five (5) days while on the road. The worker was required to make a request from the firm's home office prior to making the withdrawals. The firm states the worker was paid on an hourly basis for additional work done in their shop and at customer locations. The firm reported the worker's earnings on a Form 1099-MISC. The customers paid the firm and the firm determined the level of payment for services. The firm states the worker could not incur a loss or risk beyond the normal loss of salary as any other expense was incurred by them.

The worker was not eligible for employee benefits. The worker did not perform similar services for others, he did not advertise his services and the firm states they represented the worker as a contract worker performing services under their business name. Either party could terminate the work relationship at any time without either party incurring a liability.

---

## Analysis

---

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 firm provided the worker with training, instructions, and procedures to follow while performing his services as evidenced by the copies of the firm's policy and procedure statements. The worker provided his services on behalf of and under the firm's business name rather than an entity of his 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 his services in order to protect their financial investment, their business reputation, and their relationship with 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. "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.

While the worker's compensation was on a per unit basis, 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 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. Both parties retained the right to terminate the work relationship at any time without incurring a liability.

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.

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.