

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

Occupation 03PMW.113 RepairMaintenanceWkr	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 indicated the firm in a complete janitorial service and construction clean-up company. The worker provided janitorial services for the firm. Records show the firm reported the income on Form W-2 for tax years 2007 through 2010, 2011 through 2016 the income was reported on Form 1099-MISC. Neither party indicated there had been any changes in services. The firm reported the income on Form 1099-MISC, stating the worker was an independent contractor as he gave her no training or instructions on how to do the job. The firm stated she set her own hours and paid her own help. The firm stated she would arrive any time after the client business closed, cleaned building, secured building and left when work was completed. All services were performed at the firm's customer location. The firm indicated the worker was to perform her services personally. The firm stated the third party provided the equipment and supplies. The worker was paid a lump sum. The customer paid the firm. The firm indicated the worker set the level of payment. Either party could terminate the work relationship without incurring a penalty or liability. The firm indicated she did perform similar services for others. She was represented as a contractor. The firm indicated the worker quit.

The firm's website lists all the services it provides. It stated all of their employees must pass both a criminal and background check and drug testing. They train their employees to use alarm keypads. They are instructed to keep building entrances locked at all times, never bring family members on the premises, never use a client's office equipment, or phone (unless it is an emergency). Breaking any of those rules are terms for immediate dismissal. Nowhere on their website does it state they utilize independent contractors to perform the work.

The worker stated she was instructed to go in at eight be done by twelve, six days a week. She reported to the firm if there were any issues. The worker stated she performed services at the firm's customer – [REDACTED] twenty four hours per week. The firm hired and paid all workers. She had to ask the firm for someone to cover for her when needed. He paid them also. The worker indicated the firm provided company shirts. The firm provided the trash cans, bags, urinal air fresheners, glass cleaners, toilet cleaners, mop heads rags etc. The client provided the toilet paper and paper towels. She was paid a set salary every two weeks of seven hundred twenty-five dollars. The customer paid the firm. Either party could terminate the work relationship without incurring a penalty or liability. She was represented as an employee. She agreed she quit.

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.

Therefore, 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.

**ANALYSIS**

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.

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## Analysis

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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.

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.

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.

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.

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. The firm owns, operates, and advertises the janitorial business. It obtains its clients, and informs them of the services they provide. The firm assigns the worker to the client location and instructs what is to be performed at each client location. In the instant case the worker could not enter the business until eight o'clock and services had to be completed by twelve. The worker was paid a set salary on a bi-weekly basis. The customer paid the firm, the rates charged for their services. The work was performed under the firm's business name and identified as such by the company provided apparel.