

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

Occupation 03TRA.35 Laborer/Trades	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 is an auto repair business. The worker was hired as a general laborer to do clean up, stocking, mechanical work. The stated he had been hired on a trial basis, but it did not work out and reported the income on Form 1099-MISC. The worker feels he should have received a W-2. Services were performed from October 2013 through December 2013.

They hired him on a trial basis, hoping that he would be able to do something other than clean up but he had neither the ability or desire. The firm stated he was shown where the trash cans were and where to empty them, he was shown where the brooms were and how to use them. The firm stated he was on his own to perform the cleanup operations. [REDACTED], the stockholder of the corporation resolved any issues or problems. The firm indicated he usually worked four hours. They did not indicate whether it was four hours a day, week, month etc. Services were to be performed personally. The firm indicated he was paid by the hour. The customer paid the firm. The firm did carry workmen's compensation insurance. The firm stated the worker quit.

The worker stated he performed services Monday through Friday seven-thirty to five thirty. He also stated it was part time. Services were performed on the firm premises, as instructed by the firm. The worker indicated the firm provided all supplies, equipment and materials. He agreed he was paid by the hour and the customer paid the firm. Either party could terminate the work relationship without incurring a penalty or liability. He agreed he left because the firm would not provide pay stubs.

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.

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## Analysis

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### ANALYSIS

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.

For a defined period of time, the worker was considered to be in a "probationary" status to allow the firm time to consider the merits of retaining the worker permanently, and no taxes were withheld from the income. Once the probationary period ended, taxes were withheld from the worker's income without any meaningful change to the work relationship.

Probationary employees, even though they may not qualify for benefits, privileges, or seniority protection, still are considered employees for federal employment tax purposes. Payments made to them as compensation for services are wages subject to employment taxes. Additionally, the withholding of employment taxes from the worker's wages is considered "treatment" of the worker as an employee, whether or not the tax is paid over to the Government. Since you withheld taxes from the worker's income after the probationary period, and there was no meaningful change in the work relationship, you effectively assigned an employee status to the worker for the whole time services were performed for you. IRS has no exceptions specific to probationary pay and considers it to be services performed by an employee.

### 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 stated he was hired on a trial basis, provided training and instructions on how to perform the job. The fact he did not make it past the probationary period, does not mean he was an independent contractor, who owned and operated his own business to provide those services. (Which is indicated when the income is reported on Form 1099-MISC in Box 7). The firm provided training, the firm provided all equipment and supplies, the services were performed on firm premises as instructed and he was paid by the hour. All indicators of an employee/employer work relationship.