

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

Occupation 04FSC.13 Overseer	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 a non-profit organization with a mission to accelerate movement to partnership systems of human rights and nonviolence, gender and racial equity, economic prosperity, and sustainable environment through research, education, grassroots, empowerment, and policy initiatives. The worker was engaged by the firm as a senior advisor to advise the president of the firm, assist in fundraising and programs while focusing on developing and implementing the firm's campaigns, and other tasks as warranted. The firm reported the worker's remuneration on Forms 1099-MISC for 2010 through 2014.

Information from the parties supports that the firm relied upon the worker's prior training and experience to perform her services. The worker made work plans according to frequent phone and e-mail consultations with the president on grant proposals, and preparations for meetings and events. All responsibility for the firm's activities rested with the president. There were no regular reports required from the worker, though these were sometimes requested by the president for board meetings and to assess progress in meeting deadlines for grant proposals, arrangement of events, etc. The worker determined her own schedule, but she was required to be accessible at the firm's request. The worker generally performed services on a full-time basis. She advised the firm with times she would not be available. The worker performed her services in her home office. She attended meetings with the president and other affected parties via telephone or on-line as needed, such as board and team meetings, and meetings via e-mail or phone with potential or current funders and other organizations. The worker was required to perform her services personally. The firm intermittently contracted with other parties, sometimes hired at the worker's suggestion, and sometimes the worker made the arrangements for contracting in consultation with the president.

The firm provided the worker with a book authored by the president which the worker sometimes gave to potential funders or others. The firm also provided the brochures which the worker helped to develop. The worker provided her own supplies, property, equipment, and materials. The firm paid the worker on a lump-sum basis, paid monthly upon receipt of an invoice. It reimbursed her for expenses incurred when traveling on behalf of the firm. The firm did not cover the worker under workers' compensation. Neither party indicated the risk of the worker incurring a financial loss beyond the normal loss of compensation.

The firm stated that it did not make benefits available to the worker. It did not prohibit her from providing similar services for others during the same time period. Any finished products belonged to the firm. The firm generally represented the worker as a Director in newsletters, and the worker's address as its [redacted] office. Both parties reserved the right to terminate the work relationship at any time without incurring a penalty or liability, and in fact, the worker terminated the work relationship.

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## Analysis

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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, coadventurer, 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.

Factors that illustrate whether there was a right to control how a worker performed a task include training and instructions. In this case, while the firm relied upon the worker's prior training and experience to perform her services, the worker was required to submit updates and progress reports, showing 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. Although the worker had flexibility in determining her schedule, the firm had top priority on the worker's time and efforts. At times the firm requested that the worker be available for consultations, meetings, etc. The establishment of set hours of work by the person or persons for whom the services are performed is a factor indicating control. If the nature of the occupation makes fixed hours impractical, a requirement that workers be on the job at certain times is an element of control. The worker generally provided services from her home. 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. The worker was required to perform her services personally. 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. These facts show that the firm retained behavioral control over the services of the worker.

Factors that illustrate whether there was 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. The worker utilized her own office equipment and supplies. 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. The firm paid the worker an agreed upon yearly salary on a monthly basis. 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. The firm reimbursed the worker for expenses incurred while traveling for the firm. If the person or persons for whom the services are performed ordinarily pay the worker's business and/or traveling expenses, the worker is ordinarily an employee. An employer, to be able to control expenses, generally retains the right to regulate and direct the worker's business activities. These facts show that the firm retained control over the financial aspects of the worker's services.

Factors that illustrate how the parties perceived 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 were part of the service recipient's regular business activities. In this case, the worker performed her services on a continuing basis. She performed her services under the firm's name. The worker was not engaged in an independent enterprise, but rather the services performed by the worker as a Director and associated tasks were a necessary and integral part of the firm's mission. 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 business. The worker could have provided similar services for others during the same time period; however, it is possible for a person to work for a number of people or firms concurrently and be an employee of one or all of them. Although the firm did not provide benefits to the worker, the worker terminated the work relationship without incurring a liability. If the worker has the right to end his or her relationship with the person for whom the services are performed at any time he or she wishes without incurring liability, that factor indicates an employer-employee relationship. These facts show that the firm retained control over the work relationship and services of the worker.

Often the skill level or location of work of a highly trained professional makes it difficult or impossible for the firm to directly supervise the services so the control over the worker by the firm is more general. Factors such as integration into the firm's organization, the nature of the relationship and the method of pay, and the authority of the firm to require compliance with its policies are the controlling factors. Yet despite this absence of direct control, it cannot be doubted that many professionals are employees.

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.