

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

Occupation 03INS.43 Installer	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 delivering equipment, setting up tents for parties, and then the pick up and return of equipment/tents to the firm's store in tax years 2014 through 2016. The firm's business is described as party rentals and heavy equipment rentals; the worker was assigned to set tents for parties.

The firm's response was signed by the president. The firm's business is described as equipment rental. The worker performed delivery, set up, and retrieval of rental equipment. The worker was issued Form 1099-MISC for 2014 and part of 2015 and was issued Form W-2 for the end of 2015.

The firm responded that the worker elected/requested to work in the shop in the later months of 2015 and at that point was put on payroll. The determination is for the period of time that Form 1099-MISC was issued.

The firm responded that the worker was not given training or instructions. The worker was called when there was work and he determined the methods to use to complete the job. The worker was to notify office personnel of any problems encountered. The worker was to perform the services personally. The firm provided the rented equipment, vehicle for delivery, fuel for vehicle, and any supplies for delivery; the worker provided nothing. The firm paid the worker an hourly wage; the customers paid the firm and occasionally the worker collected payment due. The firm responded the firm carried workers' compensation insurance coverage on the worker. The worker not at risk for a financial loss and the worker did not establish the level of payment for services rendered or products sold.

The worker stated he started with the firm just after high school. He indicated that he was given training and instructions on how to deliver and set up tents and that his job never changed. The job assignments came from a supervisor; he stated that it was generally a supervisor that drove the firm's truck to the customer location. The firm determined the methods by which the worker's services were performed and was the contact for any problems or complaints. The services were rendered Monday through Saturday; he was required to perform the services personally. The worker responded he did not provide any tools or equipment and did not incur expenses except for his food. The worker was paid by the hour; the customers paid the firm.

Both parties concurred that there were no benefits extended to the worker. Either party could terminate the work relationship without incurring a liability or penalty. The firm indicated that it was unknown if the worker was performing same or similar services for others during the same time frame; the worker stated he was not working for any other business.

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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.

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.

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.

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 opportunity for higher earnings or of gain or loss from a commission arrangement is not considered profit or loss.

We have considered the information provided by both parties and have applied the above law 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.