

# SS-8 Determination—Determination for Public Inspection

Occupation 05ITE Instructors/Teachers	Determination: <input checked="" type="checkbox"/> Employee <input type="checkbox"/> Contractor
UILC	Third Party Communication: <input checked="" type="checkbox"/> None <input type="checkbox"/> Yes

I have read Notice 441 and am requesting:

- Additional redactions based on categories listed in section entitled "Deletions We May Have Made to Your Original Determination Letter"
- Delay based on an on-going transaction
- 90 day delay

**For IRS Use Only:**

## Facts of Case

The worker initiated the request for a determination of her work status as a music teacher in tax years 2016 to 2018. The firm's business is described as providing music lessons to adults and children in their homes. The worker states that she went to the homes of the students, followed the prescribed curriculum and schedule, and used resources provided by the firm.

The firm's response was signed by the owner. The firm's business is described as providing music lessons to students. The worker's services were as a music instructor; the worker set her schedule and followed a curriculum of her choice.

The worker indicated she was given training/instructions from the firm on how to teach lessons and communicate with the parents. The job assignments were disseminated via email or text message from the firm. The firm determined the methods by which the worker's services were performed. Any problems or complaints encountered by the worker were directed to the firm for resolution. The worker was required to provide verification forms (student name, week of-date, lessons given, and with explanations for missed lessons). The worker's services were generally rendered in the homes of students from 4pm to 8pm Monday through Friday. The worker was required to perform the services personally; any additional personnel were hired and paid by the firm.

The firm responded that there was no formal training given to the worker. The job assignments were offered to the worker and it was the worker that determined the methods by which the services were performed. The worker handled any problems or complaints she encountered. The worker was required to submit an invoice to be paid and a form as to availability if she wanted work. The worker's services were rendered at the customer's home. The firm indicated the worker was required to perform the services personally; however, any substitutes or helpers were hired and paid by the worker.

According to the worker, the firm provided books, candy, prizes, flash cards and white-boards. The worker furnished writing utensils. The firm acknowledged the worker was loaned books from time to time and the clients purchased their own books. Both parties concur the worker did not lease equipment, space, or a facility. The worker indicated she did not incur expenses in the performance of the job other than gasoline for which she received partial reimbursement; however, the firm stated she incurred expenses for music and supplies, gas and auto expenses, phone, and computer. The firm and worker concur the firm paid the worker a lump sum/flat fee; and, the clients paid the firm for the lessons. Both parties responded the worker was not at risk for a financial loss in this work relationship and the level of payment for services provided or products sold was established by the firm.

There were no benefits extended to the worker other than bonuses. Either party could terminate the work relationship without incurring a liability or penalty. The firm indicated the worker was performing same or similar services for others during the same time frame; the worker disagreed. The worker indicated that any new customers were referred directly to the firm; she could not discuss compensation or terms but was to refer the prospective client to the firm. The terms and conditions of lessons were subject to the firm's approval. The firm noted the worker was represented as a contractor under the firm's name.

The firm provided a copy of an incomplete Independent Contractor Agreement in addition to the 2018 Teacher Availability Form for Monday through Friday and time slots from 3:00 to 7:00, to reflect scheduled customer, and open/available time slots as well as the January 2018 Lesson Verification form.

The worker provided a copy of the firm's Teacher Policies which consisted of, but, was not limited to: all teachers required to be available for 2 years from time of hire; if work relationship ends a 60-day written notice and an exit interview with the firm owner are required; teachers may only cancel for sickness, family emergency, severe weather, vehicle failure, etc. and must be approved by the manager via text or phone call; any vacation must be pre-approved by manager 30 days in advance; teacher is responsible for scheduling make-up lessons; teacher invoices must be submitted on firm's letterhead with all lessons correctly marked for taught, cancelled, or made up and tracked in the binder provided; firm's teachers are required to arrive 10 minutes early for lesson scheduled in the studio and for lessons in the home worker is to send an ETA so student is ready; and, firm recommends teacher set a 30-minute timer on their phone when they arrive at students home; and the dress code.

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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.

A requirement that the worker submit regular or written reports to the person or persons for whom the services are performed indicates a degree of control.

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 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. For federal income tax withholding and social security, Medicare, and federal unemployment (FUTA) tax purposes, there are no differences among full-time employees, part-time employees, and employees hired for short periods. It does not matter whether the worker has another job or has the maximum amount of social security tax withheld by another employer.