



NEW HAMPSHIRE PRO BONO PROGRAM

## Low-Income Taxpayer Project

*Access to Representation for NH Taxpayers*

2 Pillsbury Street, Suite 300, Concord, New Hampshire 03301-3502  
Tel: (603) 228-6028 Fax: (603) 715-3295

April 15, 2013

To whom it may concern,

This document is to explain the relationship I [REDACTED], had with [REDACTED] [REDACTED], now [REDACTED], from June 1993 through January 2012 and why I believe that from 1998 to 2012, I was an employee not an independent contractor as initially considered.

### **1993-1998 Establishing the Relationship**

1. In 1993, I applied for a job at [REDACTED] in [REDACTED]. After interviews with HR and various people in the Engineering Department, I was made an offer, which I countered. I distinctly recall [REDACTED], the head of HR, making a comment along the lines that the salary was not as important to them as the "fit" in the department and they believed I was a the right fit. They accepted my offer, I accepted the position, which would include health insurance and other benefits. I got a W-2 from the company each year and filed accordingly. Besides engineering, the executive offices, sales, accounting, shipping & receiving, reception and a machine shop were located in [REDACTED]. There were also manufacturing plants in [REDACTED] and [REDACTED], a tool & die shop in [REDACTED], an engineering plant in [REDACTED], and offices in [REDACTED]. At the time I was hired I believe there were around 1000 employees.
2. I had been trained as an Electro-Mechanical drafter before working there and had held one other job in the field prior, which I lost due to a company lay-off. I was skilled in board work and in AutoCAD. [REDACTED] used a program, Anvil 5000, which I did not know but received some training from the drafter I was replacing and then from the engineers as needed after she left. Like any new software, there were frustrations, but I enjoyed my new job, the atmosphere and thoroughly enjoyed those I worked alongside, not only in engineering, but also in the other departments. I found myself agreeing with [REDACTED].

Although I did my work independently, my assignments came from the design engineers. If there were a scheduling conflict, the Director of Engineering would set priority. My position included working with the design engineers to produce 3D solid models of parts and assemblies in ProEngineer and SolidWorks. I generated new, and revised existing, detail drawings for

production, prototypes, manufacturing, customers and file transfer. This work was done per Engineering Change Notice, working drawings, PDF mark-ups, dimensions taken (by me) directly from prototype samples, existing parts as well as discussions with project engineer. Transferring and/or creating new drawing and part files from old to current CAD software was also within my job description. I produced company and customer logo graphics, developed a technical symbol library and [REDACTED] drawing formats.

3. [REDACTED] had a tuition reimbursement policy for courses related to one's work; [REDACTED], VP of Operations, and I discussed my taking some at [REDACTED] in Boston. Although these were under the Mechanical Design Technology Associate's Degree program I was testing the water's regarding the degree, but whether I continued or not both [REDACTED] and I would benefit from my education. During the 1994 fall, and 1995 spring semesters I took three courses at [REDACTED] and decided not to pursue the degree.
4. Around 1996, I do not recall exactly, [REDACTED] decided to switch from Anvil 500 to ProEngineer (Pro/E), state of art 3D Solid Modeling software, made by Parametric Technology Corp (PTC) in [REDACTED]. A representative came in and showed us what it could do—the capabilities were vast compared to what we were using. The learning curve, too but we all received appropriate training provided by [REDACTED]. I recall going at least twice, if not more to a training center in the [REDACTED] area. After official training, we all continued to learn and help one another as the weeks, months and years went on.
5. Soon after, engineering and the rest of the Watertown facility transitioned to a new location in [REDACTED] not far from the [REDACTED] plant. I was living in [REDACTED] at the time and my commute had been a mere 10- 15 minutes. The change was going to at least triple this and surely include traffic. I did consider finding other work, but I'd been happy at [REDACTED] and decided to stay on. The commute was bearable, my job was the same as were the people, I think only a few decided to leave or it was just time for them to retire. [REDACTED] had employees who had been with the [REDACTED], who founded [REDACTED] in 1937, since the early days. The receptionist, [REDACTED], retired after 40 years. Some of the engineers were there for over thirty. It was that kind of company.
6. When I first went back to school for my Certificate in Drafting it had been a means to an end for me, my interest was plants and natural history. I'd been looking for a field that had stability, potential for growth and one that I had interest and talent. I'd always been mechanically inclined and loved to draw—it was a perfect fit. [REDACTED] was just three blocks from my home in [REDACTED], had a 6 month program, albeit very intensive and expensive, but my goal was to work in this discipline for a few years on my way to horticulture or a related field. Therefore, in 1997, happy as I may have been at [REDACTED], I was longing for the change I'd planned. I began to explore the possibilities and eventually decided on the [REDACTED]

██████████ Associate's Degree in Horticulture at the ██████████ ██████████.

7. I was hopeful that ██████████ would let me work from home in some capacity to help me get through school for a couple years. To that end, I put out feelers and then “conspired” with ██████████, one of the design engineers, good friend and unofficial IT administrator, to help me choose my first computer and be sure it would handle Pro/E. Dec. 1997 I purchased my Gateway 2000, necessary accessories and peripherals. I applied to ██████████ and accepted for fall 1998.

My plan was for May 1, 1998 to be my last day at ██████████—I struggled with how much notice to give. It is always risky to give too much and be let go earlier than planned with no income, but my loyalty and dedication to the company, my respect for my colleagues, who had become friends and my own personal values were most important. I was the only fulltime drafter and if they were to hire someone to replace me that person would need as much transition as possible and I was happy to provide it. I decided on 11 weeks and took on the risk.

8. February 1998 I approached ██████████, Director of Engineering and my direct supervisor, to discuss the possibility of working from home. We talked about salary and they thought it best that I be off payroll, thus no benefits, on an hourly rate. I was making about \$15/hour at the time and he offered me in the low \$20's, this was not acceptable if I were not to have benefits. We finally agreed on \$25.00/hour. I do not recall having a written contract and with all of my paperwork, I have not come across one in my files. Our agreement was open-ended in that we had no set time to end this agreement or limit any projects. I figured it would be through my schooling, but nothing was set in stone.

What was also agreed upon was that ██████████ would make Pro/E available to me by installing it on my computer, licensing the software and giving me the same level of technical support that I'd had on site. This was all at their cost. ██████████ took care of the initial installation and any upgrades he would coach me over the phone. I had learned all I knew about computers, work related or otherwise, from ██████████.

██████████ and I had an understanding that I would not use any software they provided to work for another company; this was not a concern for me, as I had no desire to pursue the engineering field in any other capacity than what I was doing for ██████████. I never advertised for more drafting work nor sought another job in this field. I just worked out of my house exclusively for ██████████.

Everyone was sorry to see me go (off site) but knew that plants were my passion and glad I was pursuing my degree. They did not hire anyone within the next 11 weeks and I did work until Friday, May 1, 1998 at the ██████████ location in ██████████.

## 1998- January 2012

9. Soon after my move, I began receiving work from [REDACTED]. Just as before, the design engineers would send me assignments, and the Director of Engineering would prioritize, in case of a scheduling conflict. Occasionally a project is cancelled before completion, but I was always paid for any time I put in since I was paid by the hour, not by the project. I would send invoices via email for my hours and corresponding project to the Director of Engineering and a copy to Accounting. It would then be approved and a check would be sent to me. January of each year I would get a 1099Misc and filed my taxes accordingly. I was also working for a local nursery and as school progressed, did some garden design and programs trying to make ends meet.
10. By 2002, it was time for a new computer. Once again, with [REDACTED] invaluable input, I bought an IBM that was going to be able to manage the current and new releases of Pro/E.
11. I had only planned to get my A.A.S. but decided to go on for my B.S. and upon speaking with [REDACTED], then, and current, Director of Engineering, he felt that there would be no problem in providing me with continued work. After graduating with my B.S. in Nature Literacy and Expression (2005), I continued to work for [REDACTED]. It was still the same comfortable arrangement we'd always had—I needed the work, they needed my services.
12. In 2006, I was requested to come down to [REDACTED] from [REDACTED] for training on a substantial upgrade to Pro/E. It was for two days and [REDACTED] paid for my training costs, meals and hotel. I was also given a new 200 MB Hard Drive for my computer since others at the company had recently gotten upgrades. After installing this in my IBM, I moved all of my [REDACTED] files to this drive so that it could be used exclusively for work. It was like having a separate computer.
13. Around this time I requested a rate increase, my first in 8 years [REDACTED], HR Director, and I met to finalize when I went down for training; I'd given a range and got the high end.
14. In late 2009 and into 2010 it became more difficult for me to get as much work because [REDACTED] had been transitioning most off their new product and some existing onto new software, SolidWorks. I not only did not have it, and my trusty old IBM could not handle it. We were in a catch-22. To resolve this, it was decided to purchase a Dell computer for me, [REDACTED], (Sr. Systems Administrator), install SolidWorks and set it up with a VPN (Virtual Private Network) so that I could access the license on the company server.

15. I drove down to [REDACTED] to pick up the computer and get some startup training in SolidWorks. Once back home, there was troubleshooting, steep learning curves for both the software, the connections, networking my IBM to the Dell in order to transfer and access the files I had been working on ( I would still be working in Pro/E, too). [REDACTED], engineer, was available to help me when I had program questions and of course [REDACTED] like [REDACTED] before him, was indispensable. I'd had some successes with my writing, photography, Natural History presentations and other pursuits pertaining to my degrees, but with my move, student loans, etc. my income from [REDACTED] was still essential. I was excited to have this new program and looked forward to more work.
16. After working with SolidWorks for a while, making me more of an asset and obviously valuable to them, having not adjusted my rates for cost of living, health care or any other costs I put in a rate increase to begin Sept. 2010. After much back and forth with [REDACTED] I was told it would be discussed after January (2011) in the budget. I said it was negotiable and even offered it to be spread out over time. After waiting 5 months, I was denied.
17. By mid 2011, I had weeks of no work at all then a flurry, then little. May 2011 I was approached by a friend's husband [REDACTED] who has his own company, who knew the work I did and asked if I'd be interested in doing a project for him. As much as I needed the work, I had to decline because of the understanding that [REDACTED] and I had regarding the software. We had nothing in writing, but they had given me a lot over the 18+ years and I simply would not have felt right about it. By the end of summer and into fall I was getting less and less. That was exactly how I explained it.
18. [REDACTED] had been acquired by [REDACTED] in 2006 and I knew that a lot of restructuring was going on within the entire company and that more recently the engineering department was being divided up and projects were being moved around from one engineer to another. All of this was affecting how much work I was getting. After January 2012, I never got another project. I continued to put out my emails to remind the engineers of my availability as I always had, but it was clear that this was it. There had never been an agreement limiting how we could stop the work arrangement.
19. With so little work for so long I'd been using my savings to supplement my income just to pay my rent. I decided to call [REDACTED] to see if he still needed help. He did. I did some work for him in January and a few months after, but that ended in April 2012.

## **2012 Unemployed**

20. I did not initially file for unemployment benefits assuming I was not eligible having received 1099 Misc and thinking of myself as "self-employed." I depleted my savings and then had to take early distribution from my IRA to pay

my rent, utilities and other basic needs. I applied for food stamps and eventually went to my town welfare for help. Of course, this was all while I was looking for work, to no avail and recovering from hand surgery in May.

21. September 2012, out of sheer desperation and frustration of my having my previous year's taxes being to be used to gauge my current financial health when I applied for any type of assistance, I filed for unemployment benefits. I was not even sure what I was hoping for, then the field agent, [REDACTED], called and said I may be eligible. After conversations, information gathering and about two weeks, I was informed in early October that the NH Employment Security (NHES) had made a determination that I had been misclassified as an independent contractor for the 13 years I'd been working remotely for [REDACTED] and considered an employee, thus entitled to benefits. While waiting for NHES outcome I did some of my own research on the situation and came across the SS-8 form. I decided to file it because I believe I should be found an employee of [REDACTED] from 1998-2012.



**Part I**

**#8** I was a Mechanical Drafter/Detailer all the time I worked for [REDACTED].

I worked with the design engineers to produce 3D solid models of parts and assemblies in ProEngineer and SolidWorks. I generated new, and revised existing, detail drawings for production, prototypes, manufacturing, customers and file transfer. This work was done per Engineering Change Notice, working drawings, PDF mark-ups, dimensions taken (by me) directly from prototype samples, existing parts as well as discussions with project engineer. Transferring and/or creating new drawing and part files from old to current CAD software was also within my job description. I produced company and customer logo graphics, developed a technical symbol library and [REDACTED] drawing formats.

**Part II**

**#1** I went to [REDACTED] at [REDACTED] [company] expense July 2006 for training on an upgrade of (Pro/E) and had ongoing tech support via PTC (Pro/E manufacturer). I also

had training and full support for SolidWorks, which was the software being used for new product.



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April 15, 2013

Internal Revenue Service  
Form SS-8 Determinations  
40 Lakemont Road  
Newport, VT 05855-1555

RE:

██████████  
SS-8 Determination of Worker Status  
Tax Periods ending December 31, 2009, 2010, 2011, and 2012

Dear Revenue Representative,

On behalf of ██████████, I am submitting this Form SS-8, Determination of Worker Status, and requesting that you make a determination that ██████████ was an employee of ██████████ during the tax years 2009, 2010, 2011, and 2012, rather than an independent contractor. Please also find enclosed supporting documentation and a Form 2848, Power of Attorney.

██████████ worked for ██████████ onsite at its ██████████ and ██████████ facilities as a mechanical drafter from 1993 until 1998. Ex. A (Affidavit), pp. 1-2, ¶¶ 1, 5, 7. During that time, ██████████ considered her an employee, issued W-2s, and paid all required employment taxes. Ex. A, p. 2, ¶ 8; Ex. B (1998 W-2); Ex. C (April 1998 pay stub). In mid-1998, ██████████ moved to ██████████ and began working part-time from home while she attended school. Ex. A, pp. 2-3, ¶¶ 6-8. As explained in more detail below, the work relationship continued as before, except that ██████████ issued 1099s, paid no employment taxes, and provided no employee benefits. Ex. A, pp. 2-3, ¶¶ 6-8; Ex. D (2009, 2010, and 2011 1099-MISC and tax returns). ██████████ increased ██████████ hourly wage to offset the lack of benefits.

Restructuring of the company due to its acquisition by ITW in 2006 resulted in fewer and fewer projects for ██████████. Ex. A, p. 4, ¶¶ 17-18. Finally, in January 2012, the work stopped entirely. Ex. A, p. 4, ¶ 18. After months of little income, ██████████ applied for state unemployment compensation benefits. Ex. A, p. 5, ¶¶ 20-21. The New Hampshire Department of Employment Security (DES) made a determination that ██████████ had, in fact, been an employee of ██████████ all along, and ██████████ decided to submit this Form SS-8. Ex. A, p. 5, ¶ 21; Ex. E (DES letters).



On this day, I am also filing a protective-claim Form 1040X for 2009, 2010, and 2011. [REDACTED] will report her 2012 [REDACTED] income as wage income on her Form 1040 – also filed today – and attach a Form 8919. [REDACTED] seeks a reduction in tax liability for these years and a refund for each of them.

### Facts

[REDACTED] began her work relationship with [REDACTED] in 1993, when she applied for a job with the company as a mechanical drafter. Ex. A, p. 1, ¶ 1. [REDACTED] hired her as an employee, provided her with health insurance and other employee benefits, and issued a W-2 for each of the five years she worked onsite at the [REDACTED] or [REDACTED], facility. Ex. A, p. 1, ¶ 1.

While she worked onsite, her duties consisted of the following:

I worked with the design engineers to produce 3D solid models of parts and assemblies in ProEngineer and SolidWorks. I generated new, and revised existing, detail drawings for production, prototypes, manufacturing, customers and file transfer. This work was done per Engineering Change Notice, working drawings, PDF mark-ups, dimensions taken (by me) directly from prototype samples, existing parts as well as discussions with project engineer. Transferring and/or creating new drawing and part files from old to current CAD software was also within my job description. I produced company and customer logo graphics, developed a technical symbol library and [REDACTED] drawing formats.

Form SS-8, Addendum.

Given her level of skill, [REDACTED] completed most of her work independently. Ex. A, p. 1, ¶ 2; Form SS-8, Addendum. The work assignments, however, came from the design engineers, with the Director of Engineering telling her which project to do first, in case of a scheduling conflict. Ex. A, p. 1, ¶ 2. Moreover, [REDACTED] required her to use the program ProEngineer for each drafting project and gave her extensive training on how to use it, at company expense. Ex. A, p. 1, ¶ 4.

In 1998, [REDACTED] considered moving to [REDACTED] to return to school. Ex. A, p. 2, ¶ 6. She asked the Director of Engineering if she could work part-time for [REDACTED], from home, and he agreed. Ex. A, p. 2, ¶ 8. She negotiated a raise in her hourly pay, from roughly \$15 to \$25; in exchange, she would receive no employee benefits. Ex. A, pp. 2-3, ¶ 8.

For the next thirteen and a half years, [REDACTED] and [REDACTED] continued this arrangement. Ex. A, pp. 3-4, ¶¶ 9-19. As before, she received her assignments from the design engineers, with the Director of Engineering determining priority. Ex. A, p. 3, ¶ 9. [REDACTED] also continued to dictate which software to use, paying the license fee to have ProEngineer installed on her home computer and paying for her training on a

ProEngineer upgrade. Ex. A, p. 3, ¶ 8-15. When the company decided to switch to new software – SolidWorks – ██████████ was trained on this new program, at company expense. Ex. A, p. 4, ¶¶ 14-15. Moreover, because her old computer could not handle SolidWorks, ██████████ bought her a new computer to use for her offsite work and installed the software on it. Ex. A, p. 4, ¶ 14.

Twice during her years working at home for ██████████, ██████████ attempted to negotiate a raise. Ex. A, pp. 3-4, ¶ 13, 16. She succeeded the first time, but not the second. Ex. A, pp. 3-4, ¶¶ 13, 16. Meanwhile, ██████████ issued her a 1099-MISC each January, deeming her an independent contractor. Ex. A, p. 3, ¶ 9.

While working for ██████████, ██████████ never advertised her services as a mechanical drafter. Ex. A, pp. 3-4, ¶¶ 8, 17. “We had an understanding,” she states, “I would not use [the software] for work with another company.” Form SS-8, Part I, #9. She had no store front, and her expenses were minimal, consisting largely of paper, ink, and other necessary office supplies. Form SS-8, Part III, # 1.

██████████ paid ██████████ by the hour during these years, at the rate the parties negotiated. Ex. A, pp. 3-4, ¶¶ 8, 17. ██████████ would bill the company for the time she spent on each assignment, and ██████████ would cut her a check, withholding (at her request) a percentage of her pay for federal income taxes. Ex. F (printed sample invoices); Ex. G (DVD containing all invoices from 1998-2012). Occasionally, either a design engineer or the Director of Engineering would tell her to scrap a project before she had completed the assignment; in such cases, ██████████ would submit an invoice for the time spent, and ██████████ would pay her the requested amount. Ex. A, p. 3, ¶ 10.

There was no agreement restricting either party’s right to terminate the work relationship. Ex. A, p. 4, ¶ 18. In January 2012, after months of dwindling business and fewer and fewer assignments for ██████████, ██████████ stopped sending her any more work at all. Ex. A, p. 4, ¶ 18. A year earlier, she had turned aside a friend’s offer of similar work, *using* the ██████████ software, because of her exclusive agreement with ██████████. Ex. A, p. 4, ¶ 17. But in January 2012, however, seeing the writing on the wall, ██████████ took on a project for her friend, through his company ██████████, using the company software. Ex. A, p. 5, ¶ 19.

Eventually, with mounting bills and no more work coming in, ██████████ applied for unemployment compensation benefits with the New Hampshire DES. Ex. A, p. 5, ¶ 21. After investigation, the agency determined that her status with ██████████ was that of independent contractor, but it concluded that she had, in fact, been an employee of ██████████. Ex. E.

### Legal Standard

The question presented is whether ██████████ was an employee or an individual contractor, for purposes of calculating her tax liability under the Internal

Revenue Code. Section 3121(d)(2) of the Code defines the term "employee" by reference to the common law. Under the common law, the definition primarily depends on the company's right to direct and control the worker in the performance of his or her duties. *See, e.g., Donald G. Cave A Professional Law Corp. v. Commissioner*, T.C. Memo. 2011-48, 2717-08 (2011). The same principle applies for New Hampshire DES rulings. *See, e.g., Appeal of Aspen Contracting NE, LLC*, 53 A.3d 571, 573-74 (N.H. 2012); *Appeal of Work-A-Day of Nashua, Inc.*, 564 A.2d 445, 447 (N.H. 1989).

Guidance on how to determine the employer-employee relationship may be found in sections 31.3121(d)-1, 31.3306(i)-1, and 31.3401(c)-1 of the Employment Tax Regulations, relating to the Federal Insurance Contributions Act, the Federal Unemployment Tax Act, and income tax withholding, respectively. 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. I.R.C. § 31.3121(d)-1(c)(2).

In determining whether an individual is an employee or an independent contractor under the common law, all evidence must be considered, particularly in the areas of behavioral control, financial control, and the relationship of the parties. *See Weber v. Commissioner*, 103 T.C. 378 (1994), *aff'd*, 60 F.3d 1104 (4th Cir. 1995). 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, the filing of 1099s by a firm and the designation of the worker as an independent contractor must be disregarded.

### Analysis

██████████ easily meets the definition of "employee," for purposes of determining her federal tax liability. ██████████ had the right to control how she performed the work she did for the company, and she never bore any serious risk of incurring a loss, whether she was working onsite or at home. Moreover, she never advertised her services to other companies, and the work relationship remained essentially the same during its nearly twenty years of existence.

### Behavioral Control

Under the category of behavioral control, all the relevant factors point to an employee-employer relationship between ██████████ and ██████████.

Due to her skill, ██████████ worked largely independently. However, ██████████ instructed her on both the means of the job, as well as the end result. First of all, she was told what projects to do; the choice was never hers. Ex. A, pp. 2, 3, ¶¶ 2, 9. Second, in case of a scheduling conflict, she was told which project to do first; she did not decide.

Ex. A, pp. 2, 3, ¶¶ 2, 9. Third, she was told what tool to use – which software program. Ex. A, pp. 2-4, ¶¶ 2, 4, 12, 14-15. She was not free to pick a different one. In this way, ██████ kept control over the manner and means of work performance. As in the case of any professional, ██████ had no need to have a manager stand over her shoulder while she performed the work; review of the finished product was enough to ensure that ██████ complied with the company's instructions. *See Weber*, 103 T.C. 375, 388; *Donald G. Cave A Professional Law Corp.*, T.C. Memo. 2011-48, 2717-08 (2011) (associate attorneys held to be employees of the company). The key fact is that ██████ had the right to control how ██████ performed her work.

Also indicative of company control was the training ██████ provided ██████ on the various software programs it required her to use for the work she did. Upon joining ██████ in 1993 and after each, succeeding upgrade or change in software, ██████ provided ██████ with training and support, at company expense. Ex. A, pp. 2-4, ¶¶ 2, 4, 12, 14-15. During her offsite years, this included meals and hotel accommodation. Ex. A, p. 3, ¶ 12.

### Financial Control

Under the category of financial control, all the relevant factors also point toward an employee-employer relationship between ██████ and ██████.

First of all, the facts show that ██████ made a significant financial investment in maintaining the work relationship; ██████ did not. ██████, not ██████, paid for the expensive software necessary for her to perform the job in the way the company required her to. Ex. A, pp. 2, 3, ¶¶ 2, 4, 12, 14-15. This was true whether she worked onsite or at home. Ex. A, pp. 2, 3, ¶¶ 2, 4, 12, 14-15. Moreover, when ██████ decided to switch to SolidWorks as its software of choice, the company even bought ██████ a new computer to use at home, because her old one couldn't handle SolidWorks. Ex. A, p. 3, ¶ 14. ██████ own work-related expenses, on the other hand, were minimal, consisting largely of paper and ink. Form SS-8, Part III, #1. She also owned a black and white printer that she used for work. Form SS-8, Part III, #1.

Second, ██████ was not generally free to seek out similar business opportunities. There was an understanding with ██████ that she would not use the software they bought for her to work for anyone else. Ex. A, p. 3, ¶ 8. And for nearly twenty years, she did no such work for anyone else. Ex. A, p. 3, ¶ 8. She never advertised, and she had no store front. Ex. A, p. 3, ¶ 8. She even turned down some work that was offered by her friend at ██████. Ex. A, p. 4, ¶ 17. She worked for ██████.

Third, ██████ was paid by the hour for the work she performed for ██████, both onsite and offsite. Ex. A, p. 2, ¶ 8. As any employee could, she tried negotiating for a raise a couple of times – once, successfully, but another time, not. Ex. A, pp. 2, 4, ¶¶ 8, 17. When she didn't get the second raise, she didn't search out other clients or accounts, as an independent contractor would; instead, she stuck with the company she was working for, as most employees would. Ex. A, p. 8, ¶ 17. It's important

to note, too, that if ██████ cancelled a project before she completed the assignment, ██████ still paid ██████ for the time she spent. Ex. A, p. 3, ¶ 9. This was because she was paid by the hour, rather than as a flat fee. This is indicative of an employee-employer relationship.

Fourth, ██████ had virtually no ability to realize a profit or incur a loss during her almost two decades of work for ██████. It was ██████ that invested in the training for ██████ and the software for her computer – and even her computer. Ex. A, p. 4, ¶ 14. ██████ bore none of the expense of her work, save for the computer she bought when she moved to New Hampshire, her black and white printer, and some office supplies. Form SS-8, Part III, #1. She had no right to make decisions regarding the software to purchase; she was not making equipment choices that could affect her bottom line.

#### Relationship of the Parties

As with the previous two categories, all the relevant factors in the category of relationship point to the conclusion that ██████ was an employee of the company ██████.

Although the parties used the independent contractor label, Internal Revenue Regulation section 31.3121(d)-1(a)(3) provides that the designation or description of the parties is immaterial. It is the substance of the relationship, rather than the label, that governs the worker's status. *See Vizcaino v. Microsoft Corp.*, 97 F.3d 1187 (9th Cir. 1996).

First, it is significant here that ██████ offsite work for ██████ was identical in every material respect to her onsite work – which had been undeniably the work of an employee. Her 1998 move to New Hampshire was simply a change of location and a reduction in hours. She was a valued employee, and ██████ did what it could to accommodate her desire to move without losing her. The nearly twenty-year-long relationship attests to their success.

Second, there is no evidence of any restriction on the rights of either party to sever the working relationship. There was no written contract and no right to sue for non-completion of a project. This fact points to an employee-employer relationship.

Third, the offsite arrangement the parties negotiated in 1998 was not with any end date in mind or for some certain, specific projects or periods. Rather, it was more open-ended and indefinite. The fact that it lasted over thirteen years is telling. The relationship was not simply a string of contracts.

Fourth, the services ██████ provided to ██████ were a key aspect of the regular business of the company. Mechanical drafting was, in fact, a constant, regular part of the engineering and design work of ██████. Form SS-8, Part I, #6. This is borne out by the presence of the drafter's initials in the title block of each drawing, just under

the name [REDACTED] Form SS-8, Part IV, #9. The services [REDACTED] provided were not akin to those of a plumber called in to fix a leaky faucet.

Fifth, after investigation of all the circumstances, the New Hampshire DES made a determination that [REDACTED] was an employee. Ex. E. Although DES is a state agency, its criteria for determining worker status derive from the common law and mirror the test under the Internal Revenue Code and its regulations. *See, e.g., Appeal of Aspen Contracting NE, LLC*, 53 A.3d 571, 573-74 (N.H. 2012); *Appeal of Work-A-Day of Nashua, Inc.*, 564 A.2d 445, 447 (N.H. 1989). At heart, in both contexts, the determination revolves around the issue of control over the means and methods of the work performed, rather than simply the end result. DES applied this standard to [REDACTED] worker status question and concluded that she was, in fact, an employee of [REDACTED].

### Conclusion

In weighing all the factors present in this work relationship, it becomes clear that there was no change in worker status when [REDACTED] began working from home in 1998. She was and remained an [REDACTED] employee, for as long as she worked for [REDACTED]. For this reason, she is entitled to employee status for purposes of federal taxation.

Respectfully submitted,

Barbara G. H. Stewart, Esq.  
Coordinator, Low-Income Taxpayer Project