

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

Occupation 02AAD Architects, Artists, and Designers	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**

It is our usual practice in cases of this type to solicit information from both parties involved. Upon the submission of the Form SS-8 from the worker, we requested information from the firm concerning this work relationship. The firm responded to our request for completion of Form SS-8.

From the information provided the firm is a direct mailing business that sends targeted mailings to potential consumers and they also provide digital displays of advertisements in specific locations. The worker was engaged from February 2016 to August 2017 as a graphic designer who provided art and graphics for the firm's clients on an as needed basis. The firm believes the worker was an independent contractor (IC) due to the nature of his work. In addition, they believe the worker was an independent contractor because the worker was provided assignments based on work availability, the worker was not guaranteed work, the worker created client artwork, he obtained proof approvals from the clients, he established his work hours, and otherwise handled graphic designs.

The firm provided no training to the worker. The firm states they did provide to the worker a template for design and email addresses of clients for correspondence. The worker received his assignments via verbal instruction or email. The worker was provided with the name of the client and an email contact of the client and the worker contacted the client directly. The firm states the worker determined all methods of completion of his assignments. When problems arose, the firm states the worker would contact either them or the client directly depending on the nature of the problem. The firm was copied on emails between the worker and their client regarding completion. The firm states the worker provided a billing statement to them at the end of the month for payment. The firm states the worker did not have a daily routine. The firm states the worker would perform design work at their offices where they provided a room for the worker to complete his work when the workspace was available. The worker provided his services 80% of the time at the firm's premises and 20% of the time at other locations. The firm states the worker was not required to be on their premises at any given time and was not required to attend any meetings. The firm used other graphic designers other than the worker to perform services. The firm states if the worker used any other people to help complete his work, he was responsible for the hiring and paying of these individuals.

The firm provided the worker with a cell phone when the worker lost his own. The firm states the worker provided his own computer and any tools he needed. The firm states the worker occasionally used a computer at their premises. The worker did not incur expenses in the performance of his services. However, the firm states they occasionally paid fuel expenses to the worker when it was reasonably requested. The clients paid the firm for services rendered by the worker and the firm paid the worker at an hourly rate. The firm states the worker was financially responsible for any loss or damage of equipment as it belonged to the worker.

The worker was not eligible for employee benefits. The firm states the worker performed similar services for others but they are not aware of outside advertising done by the worker. The firm states the worker would provide the finished product to them, with client approval, for inclusion in their advertising package. Customers were advised that the graphic designs would be completed by a graphic designer but the worker was not specifically referred to in any capacity. Either party could terminate the work relationship at any time without either party incurring a liability. The firm states the worker's services were used where required and when they were no longer required, the worker was advised that he would be contacted if there was further need for his services.

The worker had no responsibility in soliciting new clients and the worker did not and was not expected to contact prospective clients.

On or about February 9, 2016, the worker completed a Form W-9 at the firm's request. At that time, the firm made it clear to the worker that the worker's services were contracted as an independent contractor on an as-needed basis. On or about March 3, 2017, the worker requested additional compensation for the design work provided to the firm and at that time the firm states they offered the worker full-time hourly employment. The firm states the worker declined full-time employment because he had other obligations, including work obligations, and was not interested in working full-time for the firm.

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## Analysis

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As in this case and 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, the worker was experienced in this line of work and did not require training or detailed instructions from the firm. The need to direct and control a worker and his services should not be confused with the right to direct and control. The worker provided his services on behalf of and under the firm's business name rather than an entity of his own. While the firm provided the worker with freedom of action as to when he performed his services, this in and of itself does not determine the worker's status as an independent contractor. The whole relationship needed to be analyzed to determine the worker's correct employment tax status. An important factor of determining a worker's status is who had the contractual relationship with the client and whom did the client pay. In this case, that relationship was between the firm and their clients. The firm was responsible for the quality of the work performed by the worker and for the satisfaction of their clients. This gave the firm the right to direct and control the worker and his services in order to protect their financial investment, their business reputation, and their relationship with their clients.

The firm's statement that the worker performed services on an as-needed basis and therefore, an independent contractor is without merit as both employees (seasonal) and independent contractors can perform services when the needs of a business warrants. A continuing relationship was established rather than a one-time transaction taking place. A continuing relationship may exist where work is performed in frequently recurring although irregular intervals. The existence of a continuing relationship indicates an employer/employee relationship was established.

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.

There was no evidence presented or found in this investigation that indicates the worker had an investment in a business related to the services he performed for the firm offering those services to the general public. The fact that the worker had a small investment in a computer and cell phone is not above and beyond what has become the growing trend in homes across the U.S.

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 the firm's business. Both parties retained the right to terminate the work relationship at any time without incurring a liability.

If a firm has to make a worker "understand" or "agree to" being an independent contractor (as in a verbal or written agreement or the filing of a Form W-9), then the worker is not an independent contractor. An individual knows they are in business for themselves offering their services to the public and does not need to be made aware of, understand, or agree to be an independent contractor.

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, co-adventurer, 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.

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.