

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

Occupation

Business/Computer Services/Office/Sales

Determination:

☒ Employee☐ Contractor

UILC

Third Party Communication:

☒ None☐ 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 is seeking a determination of worker classification for services performed as a graphic designer for the firm from January 2019 until September 2019. The worker received a 1099-MISC from the firm for 2019. The worker feels that they were misclassified as an independent contractor by the firm because they were required to clock in and out every day, they were required to go to the office, and the firm's management assigned the worker tasks and assignments.

The firm states that it sells food ingredients, nutraceuticals, and other consumer goods online. The worker was requested to provide services on graphic design projects for the firm. The firm states that the worker was an independent contractor because the firm did not offer the worker any benefits, the work duties were all centered around projects, and the worker had autonomy over their own schedule. The firm attached a copy of a consulting agreement between the parties.

The firm states that there was no training required for the worker's job duties as the worker was already knowledgeable in the job field for which they provided services. The worker received job assignments from a project management software. The firm provided suggestions to the worker on how to perform their job duties. If the worker encountered any problems or complaints while working, they were required to contact the firm's leader of the product development department for problem resolution. The worker tracked the progress of their projects in a project management software. The firm recommended to the worker that they perform duties within the regular office hours of the business so they could collaborate with the team, but the worker ultimately determined their hours. The firm states that the worker performed all duties at the firm's office premises. There were no meetings required of the worker, and the firm required the worker to personally perform services. Helpers and substitutes were not applicable. The worker states that the firm's graphic designer trained the worker on the creation and organization of labels. The worker received job assignments either in person or through software. The firm's team leads determined how job assignments were performed. There were no reports required of the worker. The worker was required to perform services at the firm's office from 9am until 5pm. The worker was required to attend team meetings and to perform services personally. The firm was responsible for hiring and paying all helpers and substitutes needed.

The firm states that they provided a computer and software programs. The worker did not provide anything for their job duties or lease anything. The worker's expenses were limited to travel to the firm's office. The firm paid the worker an hourly wage with no access to a drawing account for advances. Customers paid the firm for services provided. The firm did not carry worker's compensation insurance on the worker. The worker faced no economic loss or financial risk during the performance of their job duties. The firm and worker negotiated the hourly rate for services provided through the consulting agreement. The worker states that the firm provided an office, desk, computer, and Adobe software license. The worker did not lease anything or provide anything. The worker states that they did not incur any expenses. The worker was paid hourly by the firm and had no access to a drawing account for advances. The firm established the level of payment for services provided.

The firm did not provide any benefits to the worker. The relationship between the parties could be terminated by either party without liability or penalty. The worker did not have any restrictions by the firm regarding working for other firms. There were no non-compete agreements in place between the parties. The firm states that the worker did not have any interactions with customers and therefore was solely represented by the firm as a contractor within the firm's business. The work relationship ended when the worker chose to leave the firm. The worker states that there were no benefits offered, and the worker did not perform similar services for other firms during the work relationship. The worker was not a member of a union and did not advertise their services to the public. The worker was not allowed to work from home and was represented by the firm as an employee performing services under the firm's name. The worker quit and ended the work relationship.

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## Analysis

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.

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, a statement that a worker is an independent contractor pursuant to a written or verbal 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. Furthermore, whether there is an employment relationship is a question of fact and not subject to negotiation between the parties.

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. In this case, the firm required the worker to personally perform services. Furthermore, the services performed by the worker were integral to the firm's business operation. The firm provided work assignments by virtue of the projects needing completion, required the worker to report on project progress through a project management software, and assumed responsibility for problem resolution. These facts evidence the firm retained the right to direct and control the worker to the extent necessary to ensure satisfactory job performance in a manner acceptable to the firm. Based on the worker's education, past work experience, and work ethic the firm may not have needed to frequently exercise its right to direct and control the worker; however, the facts evidence the firm retained the right to do so if needed.

Payment by the hour, day, 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. In this case, the worker did not invest capital or assume business risks. The firm provided all software and equipment needed for the worker's job duties. 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. Based on the hourly rate of pay arrangement the worker could not realize a profit or incur a loss.

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 of product marketing. Both parties retained the right to terminate the work relationship at any time without incurring a liability. There is no evidence to suggest the worker performed similar services for others as an independent contractor or advertised business services to the general public during the term of this work relationship. The classification of a worker as an independent contractor should not be based primarily on the fact that a worker's services may be used on a temporary, part-time, or as-needed basis. As noted above, common law factors are considered when examining the worker classification issue.

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.

The firm can obtain additional information related to worker classification online at [www.irs.gov](http://www.irs.gov); Publication 4341.