

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

Occupation 02ABT Accountants/Bookkeepers/Tax Preparers	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 submitted a request for a determination of worker status in regard to services performed for the payer from July 2016 to February 2017 as a bookkeeper/controller. The work done by the worker included accounting. The payer issued the worker Form 1099-MISC and Form W-2 for 2016; Form W-2 for 2017. The worker filed Form SS-8 as she received both Form 1099-MISC and Form W-2 for 2016. The worker noticed her first few paychecks did not have taxes withheld. After speaking with company officials, the payer started withholding taxes from her paycheck. She believed the payer had corrected earlier checks.

The payer's response states it is a private school for children from preschool to 12th grade. The worker was initially contracted for a specific period to complete a specific assignment related to human resources/accounting functions. The parties entered into a written (contractor) agreement for the period August 1, 2016 to no later than August 31, 2016. Earnings for this period were reported on Form 1099-MISC. Upon completion of the initial assignment, the worker applied for and was hired for a temporary human resources position. The worker entered into an employment agreement with the payer, which remained in effective until her resignation in 2017. Earnings for this period of the work relationship were reported on Form W-2.

It is noted the payer's Form SS-8 responses are for the period August 1, 2016 to August 31, 2016.

The payer stated its former business director explained how to perform calculations. The worker determined the methods by which the one primary assignment was performed. The payer's business director was contacted and assumed responsibility for problem resolution. There were no regular reports required and no required meetings. Services were performed at the payer's premises on a flexible eight-hour day. The payer required the worker to personally perform services. Substitutes or helpers were not required. The worker stated the payer's business manager provided work assignments. Financial reports and accounting information were provided to the payer's business manager and school board. The worker's routine typically consisted of 9 am to 5 pm. The worker periodically reported to the payer's board of directors.

The payer stated it provided all necessary supplies. The worker did not lease equipment, space, or a facility. The worker did not incur expenses in the performance of services for the payer. According to the written agreement, the payer agreed to pay the worker an hourly rate of pay. A drawing account for advances was not allowed. The payer did not carry workers' compensation insurance on the worker for the period in question. The worker did not incur economic loss or financial risk. The worker established the level of payment for the services provided. The worker stated the payer established the level of payment for the services provided.

The payer stated benefits were not provided during the period in question. The relationship could have been terminated by either party without incurring liability or penalty. It is unknown if the worker performed similar services for others or advertised. There was no agreement prohibiting competition between the parties. The finished product, calculation and results, was delivered to the payer. The payer represented the worker as a contractor to its customers. Services were performed under the worker's name. Upon completion of the specific assignment, the worker applied for and was awarded an employment position as human resources manager. The worker stated she did not perform similar services for others or advertise. The payer represented her as its controller to its customers.

The (initial contractor) agreement was dated 7/27/16, for the period beginning 8/1/16 and terminating upon the earlier of completion of services or 8/31/16. It states, in part, either party could terminate the agreement with immediate effect. The worker agreed to provide the following services within the payer's human resources and accounting department: assisting with recruitment and hiring process, semi-monthly and monthly payroll process, and employee benefits administration and communication; maintaining personnel files and records, other Microsoft Excel-based analysis and assistance. Services would be performed at the payer's premises during normal hours of operation, i.e. 8 am to 5 pm. The worker warranted she was able to carry out the services and meet the standards required by the payer. The payer would pay her an hourly rate of pay, capped at a pre-determined number of hours. The worker would bill the payer at the end of the calendar month. Bills would itemize the hours worked on each task. The payer would remit payment to the worker within 30-days. The parties intended the worker to be engaged as an independent contractor. Upon termination of the agreement, the worker agreed to return all documents, records, materials, keys, etc. belonging to the payer.

The worker's invoice documents, in part, primary assignments included calculating retro pay for employees that were leaving and for current employees; setting up a spreadsheet with calculations for employees falling under and outside of the collective bargaining agreement (CBA); reviewing contracts for employees outside of the CBA. Secondary tasks/assistance included: starting to update teaching hours, payroll calculation, ...

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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, coadventurer, agent, or independent contractor must be disregarded.

Therefore, the payer's statement that the worker was an independent contractor pursuant to a written 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 payer required the worker to personally perform services. Furthermore, the accounting services performed by the worker were integral to the payer's business needs. The payer provided work assignments and assumed responsibility for problem resolution. These facts evidence the payer retained the right to direct and control the worker to the extent necessary to ensure satisfactory job performance in a manner acceptable to the payer. Based on the worker's education, past work experience, and work ethic the payer may not have needed to frequently exercise its right to direct and control the worker; however, the facts evidence the payer retained the right to do so if needed.

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 payer 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 payer 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 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. As acknowledged by the payer, the worker did not incur expenses nor did she incur economic loss or financial risk. 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 payer's business. 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 payer 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 payer can obtain additional information related to worker classification online at [www.irs.gov](http://www.irs.gov); Publication 4341.