

# SS-8 Determination—Determination for Public Inspection

Occupation 02ADM Business, Office, & Sales Services	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 in the business of developing, producing, managing, creating, and marketing all forms of advertising. The worker was engaged from January 1, 2016 to April 30, 2016 as an account executive. The worker performed services as an intern for the firm in 2015 and the firm reported the worker's earnings on a Form W-2. The firm states that in 2016 the worker approached them and proposed a contract to mine data and develop strategies to facilitate web traffic for their clients. The firm believes the worker was an independent contractor because she was given a four-month assignment and how she accomplished the assignment was entirely up to her. The firm states at the end of the four-month period, the work relationship was terminated. The firm states the worker was paid as a contractor as agreed and her contractor payment status was clearly stated on her payments.

The firm states no training was given to the worker as work assignments were based upon the worker's master's degree skills. The worker was given the assignment to develop data and marketing strategies on behalf of the firm and the worker received her assignments via emails or meetings with the firm. The worker was required to personally perform her services and the firm states the worker determined how she completed her assignments.

The firm states all clients belonged to them and so the worker consulted with both the client and them to resolve any issues that came up. The worker provided periodic progress reports to the firm but the firm states these reports were not mandatory. The firm states the worker set her own schedule based upon the time she needed to accomplish the assignment. The worker performed her services at the firm's premises, at the assigned clients' premises and/or locations mutually agreed to by the worker and the affected clients. The firm states the worker set up meetings that she required both they and the affected clients attend.

The firm states they provided office phones and office computers to the worker in order to perform her services while on their premises. The firm states the worker provided phones and computers while off their premises and her travel means. The firm states the worker incurred parking expenses which they reimbursed. The clients paid the firm for services rendered by the worker and the firm paid the worker at an hourly rate. The worker did not have an investment in a business related to services performed and therefore, could not incur a loss as a result of her services.

The worker was not eligible for employee benefits. The worker did not perform similar services for others or advertise her services. The worker performed her services as an account executive on behalf of the firm. When the worker completed her assignments, she turned it over to the firm or directly to the assigned client depending on the job. Either party could terminate the work relationship at any time without either party incurring a liability.

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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 her services should not be confused with the right to direct and control. The worker provided her services on behalf of and under the firm's business name rather than an entity of her own. 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 her services in order to protect their financial investment, their business reputation, and their relationship with their clients.

While the firm provided the worker with freedom of action as to when she performed her 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.

Subcontractors are truly independent of a firm and a firm's business. Some of the characteristics of subcontractors are that they will not consider a firm as their boss, they will have a contract for each job, they will carry their own insurance, they will pay their own helpers and labor costs, they will not have to personally perform their services but have the ability to have anyone they engage perform services since that person would be representing the subcontractor's business, and they would have their own business bank account and credit lines. Subcontractors will file tax returns and conduct themselves as real businesses. Subcontractors will dictate what services their business offers and how they process and perform those services, what software it would use, and how much it would charge for those services. We did not find that the worker had this freedom or autonomy. There was no evidence presented and through our thorough research from various sources available to us, found no evidence that the worker operated a business, advertised her services to the public, had obtained a business license or had a business registration in the state which she performed services.

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. While the firm states the worker provided her own computer while performing services away from their premises, this is not considered a significant investment. 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. Special scrutiny is required with respect to certain types of facilities, such as home offices.

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.

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.