

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

Occupation 02ADM Admissions Representative	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**

Information provided indicates the firm is a cosmetology school. The firm worker performed services for the firm as an admissions representative from 2015 through 2017. Both Form W-2 and 1099-MISC documents were issued to report the income earned. The firm indicated in the beginning of 2015 the worker was an employee, the firm indicated she was given intensive training (by a consultant) at that time. The worker indicated the work hours were flexible, services were performed both from the firm premises as well as from her home. The firm indicated the worker resigned in September of 2015. The worker was contracted back in December of 2015 to perform the same services. The firm feels the worker was then an independent contractor, due to the fact, the firm did not train, the worker could determined her (their)own hours and where they could work from. The firm did not insist the work to be done in a certain way, and no benefits were provided. There were intermittent dates of employment. The services were the same, the way the worker was required to carry our the service was different. The firm indicated there were several extended periods of time where they did not perform services for the firm. In both instances the worker was paid by the hour, the customer paid the firm. Either party could terminate the work relationship without incurring a penalty or liability. The worker indicated the worker quit.

The worker stated she was hired as admission advisor and then promoted to director of admissions. the worker agreed she left the position for one month. She indicated she return to the same position twenty to thirty days later. She agreed the firm hired a consultant to train her. Work assignments were given from the firm via websites. She indicated she had to clock in and out at the office. Services were performed on the firm premises, she was not allowed to work anywhere else. Staff meetings were held once a month. The worker indicated the firm provided all supplies. She agreed she was paid by the hour, the customer paid the firm. Either party could terminate the work relationship without incurring a penalty or liability. She indicated all work was performed under the firm's business name. She indicated the firm went out of business (sold to another company.)

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## Analysis

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The question of whether an individual is an independent contractor or an employee is one that is determined through consideration of the facts of a particular case along with the application of law and regulations for worker classification issues, known as “common law.” Common law flows chiefly from court decisions and is a major part of the justice system of the United States. Under the common law, the treatment of a worker as an independent contractor or an employee originates from the legal definitions developed in the law and it depends on the payer’s right to direct and control the worker in the performance of his or her duties. Section 3121(d)(2) of the Code provides that the term “employee” means any individual defined as an employee by using the usual common law rules.

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.

In determining whether an individual is an employee or an independent contractor under the common law, all evidence of both control and lack of control or independence must be considered. We must examine the relationship of the worker and the business. We consider facts that show a right to direct or control how the worker performs the specific tasks for which he or she is hired, who controls the financial aspects of the worker’s activities, and how the parties perceive their relationship. The degree of importance of each factor varies depending on the occupation and the context in which the services are performed.

Therefore, your 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.

Training a worker by requiring an experienced employee to work with the worker, by corresponding with the worker, by requiring the worker to attend meetings, or by using other methods, indicates that the person or persons for whom the services are performed want the services performed in a particular method or manner. This is true even if the training was only given once at the beginning of the work relationship.

A continuing relationship between the worker and the person or persons for whom the services are performed indicates that an employer-employee relationship exists. A continuing relationship may exist where work is performed in frequently recurring although irregular intervals.

We have applied the above law to the information submitted. As is the case 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, you retained the right to change the worker’s methods and to direct the worker to the extent necessary to protect your financial investment.

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.

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

## CONCLUSION

Based on the above analysis, we conclude this is an erroneous misclassification of employment. We find 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 worker returned to the same position and duties she had previously performed. Training would not have been necessary, as the firm had already given her extensive training earlier in the year. Whether the worker performed services, full time, on a flexible work schedule or intermittently, the work was performed for the firm, under the firm’s business name. No evidence was provided to indicate the worker had opened her own business to perform those services. She was continued to be paid by the hour, and the clients paid the firm for the schooling received.