

# SS-8 Determination—Determination for Public Inspection

Occupation 02COF COO	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. After the worker's initial filing of the Form SS-8, Determination of Worker Status for Purposes of Federal Employment Taxes and Income Tax Withholding, we requested information from the firm concerning this work relationship. The firm provided information in regard to this work relationship by completing Form SS-8.

From the information provided the firm is a manufacturer of synthetic sapphire and the worker was engaged under a verbal agreement from March 2017 to April 2018. The firm states the worker was engaged to work on special projects not essential to their core business. The firm believes the worker was an independent contractor while performing services for them because they had the right to control only the result of the worker's services but not how it was done and the relationship between them and the worker were both implicitly and explicitly understood as one of an independent contractor.

The firm states they provided no training or instructions to the worker. The worker received his assignments from the firm's [REDACTED] and the firm states the worker did not have any major responsibilities outside of completing the special projects he was assigned to work on. The worker determined how he completed his assignments. The worker was required to notify the firm if any problems or complaints arose for their resolution. The firm states the worker was not required to submit reports to them or attend meetings. The worker had no daily routine. The firm states the worker was required to personally perform his services at their premises.

The worker did not incur expenses while performing his services and the firm compensated the worker a set fee. The firm reported the worker's earnings on Forms 1099-MISC. The firm states they established the level of payment for the services provided. The worker did not have an opportunity to incur a loss as a result of his services for the firm.

The worker was eligible for paid holiday leave. The worker did not perform similar services for others and he did not advertise his services. The firm states they represented the worker as an independent contractor. Either party could terminate the work relationship at any time without incurring a liability. The worker terminated the work relationship.

The firm provided a copy of an email between themselves and the worker dated September 5, 2017 which outlines the worker's role as a consultant for them

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## Analysis

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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.

Section 31.3401(c)-1(c) of the regulations states that generally professionals such as physicians, lawyers, dentists, veterinarians, contractors, subcontractors, public stenographers, auctioneers, and others in an independent business or profession in which they offer their services to the public are not employees. However, if a firm has the right to direct and control a professional, he or she is an employee with respect to the services performed under these circumstances.

Often the skill level or location of work of a highly trained professional makes it difficult or impossible for the firm to directly supervise the services so the control over the worker by the firm is more general. Factors such as integration into the firm's organization, the nature of the relationship and the method of pay, and the authority of the firm to require compliance with its policies are the controlling factors. Yet despite this absence of direct control, it cannot be doubted that many professionals are employees.

The methods by which professional men and women work are prescribed by the techniques and standards of their professions. No layman should dictate to a lawyer how to try a case or to a doctor how to diagnose a disease. Therefore, the control of a firm over the manner in which professional workers shall conduct the duties of their positions must necessarily be more tenuous and general than the control over nonprofessional workers. Yet, despite this absence of direct control over the manner in which professional men and women shall conduct their professional activities, it cannot be doubted that many professionals are employees. To give an example, there are many eminent lawyers who are full-time employees of corporations and who carry on their professional work with a minimum of direct supervision or control over their methods on the part of their employer. In this case, the worker was experienced in this line of work and did not require training or detailed instructions from the firm. While the worker was given freedom of control as to when and how he performed his services, 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 the firm rather than an entity of his own. The worker, as an individual, was engaged by the firm rather than the firm engaging a business operated by the worker. These factors gave the payer 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.

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. 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), 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 a 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.

Based on the above analysis, we conclude that the firm had the right to exercise overall 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.