

SS-8 Determination—Determination for Public Inspection

Occupation 02COM Communications Workers	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 firm is a digital media company that provides online news, marketing, and design. The firm engaged the worker as a writer/news reporter from 2017 to 2020. This was pursuant to a written agreement between the parties. Both parties submitted copies of the Independent Contractor agreement signed by both parties. Both parties also submitted email threads between the two parties as evidence. The worker submitted a Form SS-8 after receiving a Form 1099-Misc from the firm. The firm replied with a Form SS-8.

The worker stated she received training on website operation and publishing instructions. She would also receive a list of meeting she was to attend for the firm. The firm contends the worker only received instructions on how to upload stories they had purchased through their portal. The worker stated she would receive her work assignments from the firm. Comparatively the firm specified no specific assignments were given to the worker. The worker would observe and write local news stories and sell them to the firm. They would request news articles from the worker. In the Independent Contractor agreement submitted by both parties, it stated the firm could direct and control the result of the work done by the worker and not the means and methods of accomplishing the result. The worker stated the firm was responsible for problem resolution whereas the firm contended it was up to the worker. They would only resolve issues if it was an issue dealing with uploading to the firm's portal. Both parties agree no reports were required. The worker described her daily routine as attending meetings, publishing online news, interviews, and research. She would perform these services at event venues and government buildings. She would also write and publish in her home. According to the worker, she was required to attend quarterly meetings. The firm specified no meetings were required. The relationship between the parties was continuous, as opposed to a one-time transaction. The nature of this relationship contemplated that the worker would perform the services personally. The worker worked exclusively and on a continuing basis for the firm. Her services were an integral and necessary part of the services the firm provided to its customers. The firm specified the worker was responsible for hiring and paying any substitutes or helpers. This was stipulated in the agreement.

According to the firm, they did not provide the worker with any supplies, equipment or materials needed to the worker to provide services to firm. The worker stated she was provided with a press pass, camera mounts and business cards from the firm. She only provided a laptop computer. The worker did not lease equipment. The firm determined the fees to be charged. The worker did not incur any significant business expenses while performing the services for the firm. The worker specified she was reimbursed for any fees she paid for while acquiring open records from the government. The worker was paid piece work. The firm set the prices by the size of the news article submitted by the worker. The firm did not allow the worker a drawing account, or advances against anticipated earnings. The firm's customers paid the firm. The firm did not carry worker's compensation insurance on the worker. The worker did not have a substantial investment in equipment or facilities used in the work and did not assume the usual business risks of an independent enterprise.

The worker was not eligible for sick pay, vacation pay, health insurance, or bonuses. According to the firm, either party could terminate the work relationship at any time without incurring a penalty or liability. The worker stated there was a "non-compete" agreement for 3 months after she resigned from the firm. She was prohibited from selling her services that were like the services she performed for the firm to other parties under either self-employment whether it be individually, partnership or part of another corporation. Evidence of this fact was in the Independent Contractor agreement that was submitted by both parties. In an email thread provided to us by the worker, the worker was to be available to the firm by either phone, text or email and be willing to help when asked. As stipulated in the email this was not optional. The worker was not a member of a union. All work produced became the property of the firm. According to internal research, the worker did not perform the services for others. She did not advertise her services to the public during the term of the work relationship. The firm submitted as evidence a web site page showing the worker had established her own news media page. However, this was established after the relationship between the two parties had ended. She was required to perform the services under the name of the firm. The relationship between the parties ended when the worker resigned due to unfair wages an excessive overtime not being paid to her.

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.

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.

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.

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

A continuing relationship was established rather than a one-time transaction taking place. A continuing relationship may exist where work is performed in frequently recurring although irregular intervals. The existence of a continuing relationship indicates an employer/employee relationship was established

Integration of the worker's services into the business operations generally shows that the worker is subject to direction and control. When the success or continuation of a business depends to an appreciable degree upon the performance of certain services, the workers who perform those services must necessarily be subject to a certain amount of control by the owner of the business. 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.

A person who can realize a profit or suffer a loss as a result of his or her services is generally an independent contractor, while the person who cannot is an employee. "Profit or loss" implies the use of capital by a person in an independent business of his or her own. The risk that a worker will not receive payment for his or her services, however, is common to both independent contractors and employees and, thus, does not constitute a sufficient economic risk to support treatment as an independent contractor. If a worker loses payment from the firm's customer for poor work, the firm shares the risk of such loss. Control of the firm over the worker would be necessary in order to reduce the risk of financial loss to the firm.

Based on the common-law principles, the firm had the right to direct and control the worker. The worker shall be found to be an employee for Federal tax purposes.

The firm can obtain additional information related to worker classification online at www.irs.gov; Publication 4341.