

Department of the Treasury
Internal Revenue Service

SS-8 Determination—Determination for Public Inspection

Occupation COM - Communications Workers (examples: newspaper reporters, union	Determination: ☒ Employee ☐ Contractor
UILC	Third Party Communication: ☒ None ☐ 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 is seeking a determination of worker classification for services performed for the firm as a ghost tour guide from February 2025 until December 2025. The worker filed a Form SS-8 because they believe that they erroneously received a 1099-NEC from the firm and that they were misclassified as an independent contractor.

The worker believes that they were an employee of the firm because they did not own their own tour guide business, they were provided with a script with quality performance standards, the firm gave them a uniform and supplies to use, the worker was required to be on call, the firm provided the worker with pre-hire training, language used in the contract between the parties implied an employment relationship, and the firm had extensive behavioral control over the work relationship. The worker attached a copy of the job offer letter, the "Ghost Tour Guide Code of Conduct and Ethics", the "Tour Guide Policy and Procedures", and a copy of the contract between the parties.

The firm states that they are a central administrative and management company that provides HR, marketing, operations and booking infrastructure for nationwide tourism brands. The worker performed services for the firm as a tour guide, independently conducting outdoor tours using a provided story framework and thematic props. The firm classified the worker as an independent contractor because the worker retained full creative autonomy over script delivery, attire, and their route without direct supervision, set their own schedule, could accept or reject assignments at will, and maintained the right to provide services to other businesses. The worker continues to provide the same services for the firm in 2026. The firm attached a copy of the written contract between the parties, the worker's availability requests, text messages between the parties, and an email from the firm regarding a monthly schedule.

The firm states that the worker received basic historical reference materials and a brief one-time orientation to ensure general brand consistency. Tours were routed solely based on availability the worker chose to submit through email. The worker determined the methods by which job duties were performed. If the worker encountered any problems or complaints while working, they were required to contact regional administrative coordinators. The worker would resolve any problems surrounding tour execution and the firm would be responsible for ticket-buyer refunds. No reports were required of the worker. Services were performed on demand based on the worker's availability along tour routes in public locations. The firm did not require the worker to attend meetings but required the worker to personally perform services. The worker could not hire helpers or substitutes and was not responsible for their payment. The worker states that the firm provided them a script to memorize, required the worker to shadow another existing tour guide, made the worker give a practice tour with a regional manager, and gave the worker feedback on what they needed to focus on for their job duties. The firm's regional operations manager provided job assignments to the worker by email, through text messages, and through a scheduling app. The worker, with guidance the firm, determined the methods by which job duties were performed. The firm's customer service was responsible for resolving problems encountered while working. The worker would provide their availability to the firm and would then be issued a schedule for guided tours. The worker had no authority to hire helpers or substitutes.

The firm states that they provided optional thematic brand props and retail inventory to distribute. The worker did not provide anything and did not lease any space, facilities, or equipment. The worker's job-related expenses included travel and transportation, parking, and mobile data for tour logistics. The firm did not reimburse the worker for expenses. Customers paid the firm. The firm paid the worker a flat fee per tour completed with no access to advance pay. The firm did not carry worker's compensation insurance on the worker. Since the worker is paid a flat fee per tour completed, they could incur a financial loss if their out of pocket expenses exceeded what they were paid. Both parties agreed upon the flat fee per tour that the worker was paid, and the firm set the price of products sold. The worker states that the firm provided a shirt, lantern, EMF detectors, and plushies. The worker provided batteries for the lantern and a spare lantern. The worker had no job-related expenses. The firm would receive payments from customers for tour, merchandise, and rentals, and the worker could receive tips from customers. The firm paid the worker a set amount per tour performed and bonuses for good performances. The worker would be required to replace any broken equipment. The firm set the rate of pay for services performed and the price of products sold.

The firm states that they did not provide benefits to the worker. The relationship between the parties could be terminated by either party without liability or penalty. There were no non-compete agreements in place between the parties. The firm represented the worker to customers as a local professional guide performing services under the firm's name. The worker is still performing services for the firm. The worker states that they were given bonuses by the firm. Either party was required to provide 30 days of notice before terminating the work relationship. There was a non-compete clause in the contract between the parties. The worker did not perform similar services for other firms or advertise their services to the public.

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, co-adventurer, agent, or independent contractor must be disregarded.

Therefore, a statement that a worker is an independent contractor pursuant to a written or 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. 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 firm required the worker to personally perform services. Furthermore, the services performed by the worker were integral to the firm's business operation of providing tour services. The firm provided work assignments by virtue of the customers served, gave the worker required training and feedback, shadowed the worker, and assumed responsibility for problem resolution. These facts evidence the firm retained the right to direct and control the worker to the extent necessary to ensure satisfactory job performance in a manner acceptable to the firm. Based on the worker's education, past work experience, and work ethic the firm may not have needed to frequently exercise its right to direct and control the worker; however, the facts evidence the firm retained the right to do so if needed.

Payment by the hour, day, 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 firm 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 firm has the right to direct and control the performance of the workers. 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. Based on the per tour 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 firm's business as a tour company. 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. In fact, there was a covenant not to compete in the contract between the parties prohibiting the worker from doing so. 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 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 firm can obtain additional information related to worker classification online at www.irs.gov; Publication 4341.