

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**

: Both parties are seeking a determination of worker classification for services performed by the worker for the firm as a community liaison from June 2020 until January 2026. The firm is requesting the determination for clarification on the worker's classification. The worker is requesting a determination because they feel that the firm misclassified them as an independent contractor despite exercising significant behavioral and financial control over the work performed.

The worker believes that they were an employee of the firm because they worked full-time for the firm, they reported directly to the firm's president and founder, they worked on commission from 2020 through 2024 when they were put on salary, and they were listed as a key employee by the firm on their tax forms in 2020. The worker was paid on a 1099-NEC basis for all years except for 2022, where they were also provided with a W-2. The worker provided email correspondence between the parties, screenshots of the firm's website advertising the worker as a member of staff, copies of the firm's 2020 990-EZ showing the worker was reported as a key employee, offer letters from the firm to the worker, and a "Memorandum of Understanding" between the firm's board of directors and the firm's key leadership. There were no solid written agreements between the parties until 2024 when the worker was put on a salary.

The firm states that they are a non-profit organization dedicated to breach training, education, and advocacy. The worker provided services for the firm as a community liaison, responsible for scheduling and planning in-person workshops, processing scholarship applications, and providing student support. The firm classified the worker as an independent contractor because the worker performed services remotely with no set schedule, and work was performed on an as-needed basis based on the volume of workshops and online registrations. The firm attached a copy of the Consulting Agreement between the parties effective in 2022, a salary offer letter in 2024, a letter from the firm to the IRS, and email correspondence between the parties. The offer letters to the worker do state that the worker would be performing in a full-time position.

The firm states that the worker drew on their own experience and preferred methods to perform their job duties. Job assignments were provided to the worker via automated website submission forms and 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 the board of directors or the executive director for problem resolution. There were no reports required of the worker. Event planning and student support services were performed as needed from the worker's home office. The firm required the worker to attend staff meetings and to perform services personally. The worker could not hire helpers or substitutes and was not responsible for their payment. The worker states that they were under the direct control of the president, executive director, and founder of the firm. Specific job responsibilities were laid out in the contract between the parties, and the executive director provided job assignments through a messaging app and emails. The executive director determined the methods by which job duties were performed and assumed responsibility for problem resolution. Services were performed on a full-time basis for the firm at the worker's office, as all staff were fully remote. The worker was required to attend staff meetings and often scheduled and facilitated other team meetings for the firm. The worker had no hiring authority.

The firm states that they did not know what the firm or worker provided since work was performed remotely in a home office. The worker did not lease any space, facilities, or equipment. The worker incurred the job-related expenses of wi-fi and office supplies. The firm reimbursed the worker for up to \$500 monthly for office expenses. Customers paid the firm. The firm paid the worker a commission through 2024 and then transitioned them to salary. The firm did not give the worker access to advance pay and did not carry worker's compensation insurance on the worker. The worker did not take a financial risk or suffer a financial loss while working for the firm. The firm set the rate of pay for services performed and the price of products sold. The worker states that the firm provided the worker with a monthly office supplies stipend. The worker used their personal computer and the provided stipend for office supplies such as wi-fi expenses. The firm also provided the worker with a company credit card to pay for any job-related expenses. The firm gave the worker access to pay advances on a few different occasions. The worker had no exposure to financial risk or loss while working for the firm.

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. The worker did not perform similar services for other firms. There were no non-compete agreements in place between the parties. The worker did not advertise their services to the public. The firm did not represent the worker to customers. Services were performed under the firm's name. The firm ended the work relationship. The worker states that the firm provided personal days and bonuses to the worker. In the salary agreement between the parties, there was a non-compete agreement prohibiting the worker from providing similar services to other firms. The firm represented the worker to customers on their website as a member of staff with an organizational email address, performing services under the firm's

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. The firm provided work assignments by virtue of the customers served, required the worker to perform services on a full-time basis and to attend meetings, 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. As stated by both parties, the worker had no financial risk and was reimbursed for any job-related expenses. Additionally, the worker was provided with a stipend to offset office expenses. Based on the salary 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. Both parties retained the right to terminate the work relationship at any time without incurring a liability. The work relationship was ongoing for several years. 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. The firm also represented the worker as an integral part of the company based on the company-provided email address. 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.