

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

Occupation 02CON Consultants	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 in the business of providing management consulting for the supply chain industry. The worker was engaged as a supply chain consultant as he had a background in supply chain management. He received a Form 1099-MISC for his services in 2015, 2016, and 2017. There was a written agreement.

In this case, the worker first provided services for the firm when he was engaged through a temporary agency. The firm trained the worker initially and therefore, he had some experience in this line of work when hired directly by the firm. Both parties agreed that the worker received his work assignments from the firm via the phone or an email schedule. The customer would send to the firm, a list of products to be inspected. The firm determined which worker would work specific projects based on the customers' schedule. The firm determined the methods by which the assignments were performed though the firm indicated that its customer did. The worker added that the firm's retail audit procedures were very detailed. Both parties agreed that the firm would be contacted if any issues or problems arose. Submitting reports were dependent on the project and who was the team leader; however, the firm noted that no reports were submitted by the worker. His work hours were dependent on the project. The firm added that he might choose his own hours or travel with the team which would indicate a travel itinerary to follow. Both parties indicated that the worker worked at the firm's customers' locations. There were periodic conference call meetings. Both parties also agreed that the worker was required to provide the services personally. According to the worker, only the firm hired and paid any helpers or substitutes.

The firm provided office supplies such as a laptop, software, box cutters, tape, scales and cameras; and reimbursed the worker for travel expenses. The firm also paid a set amount per diem and reimbursed for the mileage if a personal car was used. The worker was paid a lump sum/set weekly amount; he had no other economic risk. Both agreed that the customer paid the firm. The level of payment for services was mutually agreed upon although the worker noted that it was the firm that established the level of payment for services.

Both the firm and the worker agreed that there were no benefits and that either party could terminate the relationship without incurring a liability. Both parties agreed that the worker did not perform similar services for others. A confidentiality agreement included a non-compete provision. The relationship ended when the worker quit.

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## Analysis

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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. The relationship of the worker and the business must be examined. 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 should be considered. 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.

Factors that illustrate whether there is a right to control how a worker performs a task include training and instructions. In this case, the firm retained the right to change the worker's methods and to direct the worker to the extent necessary to protect its financial investment. The firm obtained the customers and engaged the worker to supply the labor as needed for its operations. The worker had previous work experience with the firm and continued to receive instructions. While the worker's work days and hours might have varied, if the nature of the occupation makes fixed hours impractical, a requirement that workers be on the job at certain times is an element of control. The worker may not have worked at the firm's location; however, control over the place of work is indicated when the person or persons for whom the services are performed have the right to compel the worker to travel a designated route, to canvass a territory within a certain time, or to work at specific places as required. In addition, the worker worked throughout a number of years on a continuous basis; his services were not just a one-time occurrence. 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.

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. The firm provided the worker with the equipment, tools, and supplies that were needed in order for the worker to provide his services. The firm also paid for or reimbursed the worker for any required travel and associated expenses. If the person or persons for whom the services are performed ordinarily pay the worker's business and/or traveling expenses, the worker is ordinarily an employee. An employer, to be able to control expenses, generally retains the right to regulate and direct the worker's business activities. The worker received a set weekly amount and had no other economic risk other than the loss of that compensation. Payment by the hour, 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.

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. There were no benefits.

There was a written agreement. However, the firm's belief 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. Furthermore, in *Bartels v. Birmingham*, 332 U.S. 126, 1947-2 C. B.174, the Supreme Court stated that whether there is an employment relationship is a question of fact and not subject to negotiation between the parties. So simply signing any agreement that indicated the worker was an independent contractor did not make the worker self-employed when the facts support an employer-employee relationship.

The worker was engaged by the firm to provide its supply chain management services to its customers. When doing so, the worker was not engaged in a separate business venture. 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.

Based on the above analysis, we conclude that the firm had the right to exercise direction and control over the worker for the entire work relationship to the degree necessary to establish that the worker was a common law employee and not an independent contractor operating a trade or business.

Please see Publication 4341 for guidance and instructions for firm compliance.