

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

Occupation

02COO Coordinator

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**

It is our usual practice in cases of this type to solicit information from both parties involved. Upon the submission of the Form SS-8 from the worker, we requested information from the firm concerning this work relationship. The firm responded to our request for completion of Form SS-8.

From the information provided the firm is a start-up box subscription company who sells curated boxes to adult children of aging parents. The firm states the worker was engaged as an independent contractor who did project task work from October 2017 to February 2018. The firm believes the worker was an independent contractor while performing services for them because the worker was engaged to fill the need for independent project work. There was no written agreement between the firm and the worker.

The only training the firm provided to the worker was a briefing on their product offerings. The worker received her assignments from the firm's chief executive officer (CEO) and as a result of project meetings. The firm states the worker was required to personally perform her services and she performed her services 85% of the time in her home and 15% at their office. The firm states any issues the worker encountered would be required to be brought to the CEO. The worker was required to submit weekly project updates to the firm. The firm states the worker chose the hours and days to work and she worked independently on projects. The worker attended scheduled meetings. The firm states they were responsible for the hiring and paying of substitutes or helpers.

The firm states they provided a meeting space to the worker and the worker provided a computer, email account, telephone, printer and writing materials. The worker incurred expenses for project examples which the firm reimbursed her for this expense. The worker was compensated at a bi-monthly flat rate which the firm states they established. The worker did not have an investment in a business related to services performed and therefore, did not incur a loss as a result of her services.

The firm states the worker was eligible for insurance benefits and bonuses. The worker did not perform similar services for others and she did not advertise her services. Either party could terminate the work relationship at any time without either party incurring a liability. The firm terminated the work relationship.

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## Analysis

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As in this case and 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.

Evidence of control generally falls into three categories: behavioral control, financial control, and relationship of the parties, which are collectively referred to as the categories of evidence. In weighing the evidence, careful consideration has been given to the factors outlined below.

Factors that illustrate whether there is a right to control how a worker performs a task include training and instructions. In this case, the worker was experienced in this line of work and did not require training or detailed instructions from the firm. The need to direct and control a worker and her services should not be confused with the right to direct and control. The worker provided her services on behalf of and under the firm's business name rather than an entity of her own. There was no evidence presented or found in this investigation that the worker owned and operated her own business providing these same services to the public. The firm reserved the right to review the worker's services for eligibility for performance bonuses which they offered. The firm states the worker had flexibility in the hours she worked and whether she worked at home or their office, however, she could do this only if she had the firm's approval. While the firm may not feel this is exerting control, it is exerting control. The firm retained the right to direct and control the worker and her services in order to protect their financial investment, their business reputation, and to ensure completion of projects she was engaged to complete.

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. With more and more workers working out of their home office and this becoming the reoccurring trend in the current workplace, this fact by itself, does not mean that the worker is not an employee. It also does not mean the worker had a significant investment. 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. Special scrutiny is required with respect to certain types of facilities, such as home offices.

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.

If a firm has to make a worker "understand" or "agree to" being an independent contractor (as in a verbal or written agreement or the filing of a Form W-9), 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 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.

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.