

SS-8 Determination—Determination for Public Inspection

Occupation 02COO Coordinators	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

It is our usual practice in cases of this type to solicit information from both parties involved. After the worker's initial filing of the Form SS-8, Determination of Worker Status for Purposes of Federal Employment Taxes and Income Tax Withholding, we requested information from the firm concerning this work relationship. The firm provided information in regard to this work relationship by completing Form SS-8.

From the information provided the firm is a small start-up travel company and tour operator that designs and organizes personalized private tours and travel experiences for visiting clientele in the destinations the firm serves. The worker was engaged under a written agreement from September 10, 2018 to December 10, 2018 as an experience coordinator. The firm states the worker's services were specific in nature and included coordinating the scheduling of experience resources such as internal personnel, transportation suppliers, and agreed venues/vendors. The firm believes the worker was an independent contractor while performing services for them because the worker signed an independent contractor agreement and Form W-9, she had a large amount of independence in her work with flexible hours, she worked from home during self-regulated hours, she used her own equipment, and she was issued a Form 1099.

The firm states they provided training to the worker on general Cloud based sales and accounting software only. The firm provided the worker with her assignments via their general Cloud based sales and accounting software or by direct communication with the firm's co-owners. The firm states the worker determined how she completed those assignments. The firm states that given the nature of their business, it situational and depending on the circumstances, dictates who was responsible for the resolution to any problems or complaints that arose. The firm states the worker was not required to submit reports to them and there were no required meetings or penalties. The firm states they held Monday morning teleconferences that were conducted and open for anyone to attend. The worker was required to personally perform her service and her services were performed 45% of the time at the firm's home office and 45% of the time at the worker's chosen venue. The firm states the worker chose to work two-three days a week in the firm's home office during hours that she chose.

The firm provided access to Cloud based sales and accounting systems and the firm states the worker provided any and all necessary items to conduct normal business including computer/hardware/software, cell phone, vehicle, and printer. The firm states the worker incurred expenses for office supplies and cell phone/communications which they did not reimburse. The clients paid the firm for services rendered by the worker. The firm states the worker was compensated on project based fees that were paid weekly. The firm states the worker established the level of payment for the services provided.

The firm states the worker advertised her services via business cards with contact information for her services. The firm represented the worker as a representative to their clients. Either party could terminate the work relationship at any time without incurring a liability. The relationship ended when the contract was terminated.

The contract between the firm and worker states in part that:

- o The role of experience coordinator is considered independent contractual hourly employment;
- o Working hours are flexible as needed but would likely fall between 9 AM to 5:30 PM Monday to Friday with some weekend or additional hours as needed per client bookings (max. 40 hours week). Paid holidays include New Year's Day, Mardi Gras Day, Memorial Day, Independence Day, Labor Day, Thanksgiving, and Christmas Day.
- o The position title is "Experience Coordinator";
- o The position reports to the Chief Experience Officer;
- o Experience Coordinators are paid an annual amount, subject to six (6) month and annual review. Bonuses pending annual profitability at the discretion of the firm. Paid vacation consisting of one (1) week after 90 days; one (1) more week after six (6) months. Beginning on the worker's anniversary date, the worker will begin to accrue additional paid vacation time at a specified rate per hour for each day worked.

Analysis

As is the case 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 firm states they provided the worker with little training or instruction. While the worker may have been experienced in this line of work and did not require training or detailed instructions from the payer, 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 the payer rather than an entity of her own. The worker was required to report to a supervisor and was subject to a six (6) month and annual review. The payer was responsible for the quality of the work performed by the worker and for the satisfaction of their clients. This gave the payer the right to direct and control the worker and her services in order to protect their financial investment, their business reputation, and their relationship with their clients.

While the firm provided the worker with freedom of action as to when she performed her services, the firm requested that she perform her services between normal business hours. Allowing the worker to choose her hours in and of itself does not determine the worker's status as an independent contractor. The whole relationship needed to be analyzed to determine the worker's correct employment tax status. An important factor of determining a worker's status is who had the contractual relationship with the client and whom did the client pay. In this case, that relationship was between the firm and their clients.

Independent contractors are truly independent of a firm and a firm's business. Some of the characteristics of independent contractors are that they will not consider a firm as their boss, they will have a contract for each job, they will carry their own insurance, they will pay their own helpers and labor costs, they will not have to personally perform their services but have the ability to have anyone they engage perform services since that person would be representing the independent contractor's business, and they would have their own business bank account and credit lines. Independent contractors will file tax returns and conduct themselves as real businesses. Independent contractors will dictate what services their business offers and how they process and perform those services, what software it would use, and how much it would charge for those services. A firm does not dictate how a worker will operate his or her own business, what services that business will offer, and what his or her responsibilities are in a specific position.

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. A copy of a policy agreement between the firm and worker for the use of company issued credit card was submitted in this investigation indicating the firm bore the expense in the work relationship and not the worker.

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, there was no evidence presented or found in this investigation that indicates the worker was not engaged in an independent enterprise. Both parties retained the right to terminate the work relationship at any time without incurring a liability.

The firm provided a copy of a Form W-9 signed by the worker. The Form W-9 is used as an information document to verify a taxpayer identification number or Social Security number or is used to certify that a worker is not subject to "Backup Withholding". The Form W-9 has no bearing on the SS-8 determination process and does not determine the worker's status of 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 the completion and signing of a Form W-9 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 or the completion of a W-9 form.

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.