

SS-8 Determination—Determination for Public Inspection

Occupation 02CSP Computer Services Performed	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 provides cloud based software to museums and cultural institutions, enabling its clients to customize event setups; monitor membership sale options, discounts, and venue resources; and report on data using the firm's standard reports or enabling clients to create their own reports. The firm's website states that its experienced services and support team is dedicated to making sure clients are taken care of every step of the way. The firm engaged the worker to perform customer service assignments. The firm reported the worker's remuneration on Forms 1099-MISC in 2016 and 2017.

The agreement between the parties, effective December 12, 2015, states, among other things that the worker is an independent contractor; the worker will perform services under the general direction of the firm, but the worker will determine, at her own discretion, the manner and means by which services are accomplished, subject to the requirement that she will comply with applicable law; the worker will report all income from the firm to applicable government agencies and is responsible for the payment of all applicable taxes or similar items; the worker is not entitled to any benefits afforded to the firm's employees; the firm will not carry any liability insurance on behalf of the worker; the worker acknowledges that all work product will be the sole and exclusive property of the firm, and she irrevocably transfers and assigns to the firm all work product and moral rights; during the time of the agreement, the worker will not provide services to any business that is competitive with the firm; and the worker may not assign or transfer any of her rights or delegate any of her obligations under the agreement, without the firm's prior written consent. Exhibit A – Statement of Work states the firm will pay the worker an hourly rate; the worker will invoice the firm on a monthly basis for the number of hours worked; there is no guarantee of a minimum amount of hours; and the schedule is subject to shifts if call volume is slow. The worker is required to help customers place orders, reschedule tours, and research order questions; perform client services; help with testing software product; update the firm's knowledge base with helpful information; perform data entry as needed to assist clients, client services, or call center management; provide assistance to other customer service representatives that are on-boarding; and perform other tasks as discussed and agreed upon.

Information from the parties supports that the firm relied upon the worker's prior training and experience to perform her services. The worker determined where and when to work; once selected, assignments were routed to the worker. The worker was required to perform her services personally. The worker provided her own office equipment and supplies, including computer equipment and peripherals. Neither party indicated an investment by the worker in the firm or a related business. Both parties reserved the right to terminate the work relationship without incurring a penalty or liability, and in fact, the firm terminated the work relationship.

Analysis

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.

Factors that illustrate whether there was a right to control how a worker performed a task include training and instructions. In this case, the firm relied upon the worker's prior training and experience to perform her services. Some employees may work without receiving instructions because they are highly proficient and conscientious workers or because the duties are so simple or familiar to them. Furthermore, the instructions, that show how to reach the desired results, may have been oral and given only once at the beginning of the relationship. The firm provided the worker with her work assignments. It must have retained the right to change the worker's methods and to direct the worker to the extent necessary to protect its financial investment. The worker determined where she worked at her own discretion. Work done off the premises of the person or persons receiving the services, such as at the office of the worker, indicates some freedom from control. However, this fact by itself does not mean that the worker is not an employee. The worker was required to perform her services personally, meaning she could not engage and pay others to perform services for the firm on her behalf. 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. These facts show that the firm retained behavioral control over the services of the worker.

Factors that illustrate whether there was 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. "Profit or loss" implies the use of capital by a person in an independent business of his or her own. There is no evidence to suggest the worker's office equipment and supplies were purchased exclusively for business purposes. Presumably these items were also used by the worker for her personal needs, and therefore, they are not considered a significant business investment. The firm paid the worker at an hourly rate. Payment by the hour generally points to an employer-employee relationship. These facts show that the firm retained control over the financial aspects of the worker's services.

Factors that illustrate how the parties perceived 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 were part of the service recipient's regular business activities. In this case, the worker performed her services on a continuing basis. A continuing relationship between the worker and the person or persons for whom the services are performed indicates that an employer-employee relationship exists. The worker was not engaged in an independent enterprise, but rather the services performed by the worker as a customer service representative were a necessary and integral part of the firm's business of providing cloud based software and services to its customers. 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. The firm prohibited the worker from performing services to similar firms. An independent contractor is expected to work for other entities, usually at the same time as he or she is working for the employer. Although the firm did not make benefits available to the worker, the firm terminated the work relationship without incurring liability or penalty. The right to discharge a worker is a factor indicating that the worker is an employee and the person possessing the right is an employer. These facts show that the firm retained control over the work relationship and services of the worker.

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.