

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

## Occupation

02CSP Computer Services Personnel

## 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 in the business of selling process automation and instrumentation equipment for the life sciences, chemical, petro chemical, oil & gas, food and beverage, and waste water industry. The firm states they consult with their clients to select and apply measurement instruments based on the customer's specific application. The firm states that from 2013 to 2018, the worker offered his contracting services to customize and modify their office software/sql database that they use to process orders. The firm states the worker's services were requested on an as-needed basis. The firm believes the worker was an independent contractor while performing services for them because the worker set the pricing for his services, he was engaged for his software programming skills which he advertised as an independent contractor on a website, he simultaneously worked for multiple customers, he determined when, where, and how he worked, and he sent them invoices for completed on a per hour cost basis.

The firm states that the verbal agreement with the worker is that when the worker presented his services he could offer to help with modifications to their software they had been using prior to his engagement and they agreed that he would send them invoices for the time he spent programming. It was agreed that his simultaneous work for other clients could continue and therefore they would be flexible on when he could complete programming work for them.

The firm states they had no expertise in the field of SQL programming and therefore, they provided the information of what they were looking for to the worker. The worker presented concepts of how it could be accomplished and the worker started once the firm approved the project. The worker received his assignments on an as needed basis and as software issues arose, either because of malfunction or because of the firm's desires to improve or add features. The worker determined how he completed the assignments based on his proposed route of implementation. The firm states the worker was communicating with their CTO regarding progress and possible difficulties which came up during software changes. The firm states they received feedback from the worker that software changes were implemented so they started testing. The worker reported potential errors resulting from the changes and they were then addressed. The firm states the worker provided invoices via his consulting company including a brief work summary. The firm states the worker was not required to personally perform his services and the worker worked at locations of his choice with the exception of meetings at their office to discuss status of the project. Meetings were scheduled based on the participants availability. The firm states they did not have visibility to the worker's schedule and the worker worked on his own schedule. The firm states the worker decided for what client he worked and at what day/time he worked. The firm states the worker would hire any substitutes or helpers if he chose to get help. The worker would invoice the firm for work performed; The firm states that their HR Department would pay independent of whether the worker or his helper would actually do the work.

The firm provided the office software that ran on servers in a remote data center to which they provide as needed remote access to the worker via the internet. The worker provided a laptop computer any other reference/tooling or software installed on his laptop needed to complete the work; i.e. Excel, Word, etc. It is unknown to the firm if the worker leased a space in order to perform his services. It is unknown to the firm if the worker incurred any business expenses as they did not reimburse the worker for any expenses. It is unknown to the firm if the worker could incur a loss as a result of his services.

The firm states the worker performed similar services for others and they found the worker's ad on a social media website advertising for programming services as an independent contractor. This information, however, was not provided for consideration. Either party could terminate the work relationship at any time without either party incurring a liability.

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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.

Section 31.3401(c)-1(c) of the regulations states that generally professionals such as physicians, lawyers, dentists, veterinarians, contractors, subcontractors, public stenographers, auctioneers, and others in an independent business or profession in which they offer their services to the public are not employees. However, if a firm has the right to direct and control a professional, he or she is an employee with respect to the services performed under these circumstances.

Often the skill level or location of work of a highly trained professional makes it difficult or impossible for the firm to directly supervise the services so the control over the worker by the firm is more general.

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 his services should not be confused with the right to direct and control. The worker provided emails from the firm indicating they directed the sequence of the worker's services. We believe the firm retained the right to direct and control the worker and his services in order to protect their financial investment and to insure the outcome they expected.

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.

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 firm provided invoices from the worker for a consulting services business purportedly owned and operated by the worker. While the firm provided the three invoices for this consulting business, these invoices were for the 2014 and 2015 tax years. The firm paid and reported the worker's income to him as an individual and not to a business entity. There was no evidence presented and through our thorough research from various sources available to us, found no evidence that the worker owned or operated under a consulting business name in 2017 and 2018, that he advertised his services to the public, had obtained a business license or had a business registration in the state which he performed services. The firm did not provide any invoices or contract that indicates they engaged the services of a business possibly owned and operated by the worker in 2017 and 2018. Both parties retained the right to terminate the work relationship at any time without incurring a liability.

If it is a financial necessity to work for one or more entities, it does not make the worker an independent contractor. In addition, it is possible for a person to work for a number of people or firms concurrently and be an employee of one or all of them.

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.