

**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**

The worker initiated the request for a determination of her work status with the firm having been hired for a project to convert an old system of automation to a newer one, in tax year 2018, for which she received Form 1099-MISC. The firm's business is described as payment processing for health providers. She responded to the job posting with the following description: the firm is looking for a highly motivated, hands-on Software Quality Assurance Test Engineer to support the quality assurance and testing efforts for the IT technology products. Primary Responsibilities: Develop and utilize test plans and scripts for assigned work; Perform application and system testing to ensure program changes are functional and are in compliance with various standards; Execute test cases and create and maintain accurate documentation regarding completed test cases. Identify and log defects and retest fixes; Work with developers, business analyst, and end user groups to identify/resolve issue with system changes; Reviews results of tests to determine if product specifications are met in line with requirements and standards. Ensure the proper execution of software test plans and test approaches. Manage the planning and scheduling testing efforts, test plan execution and product delivery. and, Communicate test progress, test results, and other relevant information to project stakeholders and management. She stated she was provided with an Employee handbook and other papers to sign that were indicative of an employee and was provided with the independent contractor agreement. She indicated she was told that everyone signed the documents, that people were brought on as contractors, and then may become an employee.

The firm's response was signed by the CFO. The firm's business is electronic health care payments. The worker was engaged to translate Automate language into ActiveBatch language.

Both parties provided copies of the Independent Contractor Agreement with Exhibit A (description of services) and Exhibit B (payment). In both cases the contract had names, position/title, and dates typed in; however, neither of the copies were signed by the parties involved. Essentially it was a 3-month contract that could be extended 12 months with ActiveBatch jobs being written and tested as directed by the firm for which she would be paid \$XX/hour.

The worker stated she was to write and test jobs as directed by the firm; the job assignments came from a supervisor/senior staff of the firm. The firm's supervisor/senior staff determined the methods by which the worker's services were performed; any problems or complaints encountered by the worker were directed to the firm for resolution. The worker was required to submit time sheets via Microsoft excel. She performed her services Monday through Friday, for 8 hours a day, and at the firm's location; working remotely was not allowed. The worker was required to perform the services personally; any additional personnel were hired and paid by the firm.

The firm responded that the worker was given training and instructions as to industry standards in the healthcare industry. The worker was provided with the job assignments at the beginning and the worker managed through it. The worker determined the methods by which the services were performed; any problems or complaints encountered by the worker were directed to the firm's Director of Application Development for resolution. The worker's services were rendered at the firm's corporate location due to security issues and performed during their business hours. The worker was required to perform the services personally; any additional personnel were hired and paid by the firm.

The firm and worker acknowledge that the firm provided a laptop, system access, and building access. The worker furnished nothing, she did lease equipment, space, or a facility, and she did not incur expenses in the performance of her job. The firm paid the worker an hourly wage; the customers paid the firm. The worker was not covered under the firm's workers' compensation insurance policy. The worker was not at risk for a financial loss in this work relationship. The firm established the level of payment for services provided or products.

Both parties concur there were no benefits extended to the worker and that either party could terminate the work relationship without incurring a liability or penalty. The worker was not performing same or similar services for others during the same time frame. Both parties referenced a non-competition clause in the 'agreement'. The worker stated she was terminated without notice that the project was complete.

---

## Analysis

---

A worker who is required to comply with another person's instructions about when, where, and how he or she is to work is ordinarily an employee. This control factor is present if the person or persons for whom the services are performed have the right to require compliance with instructions. 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.

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.

The establishment of set hours of work by the person or persons for whom the services are performed is a factor indicating control. 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 term "full-time" may vary with the intent of the parties and the nature of the occupation since it does not necessarily mean working an eight hour day or a five or six day week. If the worker must devote substantially full-time to the business of the person or persons for whom the services are performed, such person or persons have control over the amount of time the worker spends working and, therefore, the worker is restricted from doing other gainful work. An independent contractor, on the other hand, is free to work when and for whom he or she chooses.

If the work is performed on the premises of the person or persons for whom the services are performed, that factor suggests control over the worker, especially if the work could be done elsewhere. 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 importance of this factor depends on the nature of the service involved and the extent to which an employer generally would require that employees perform such services on the employer's premises.

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. Also, workers are assumed to be employees if they are guaranteed a minimum salary or are given a drawing account of a specified amount that need not be repaid when it exceeds earnings.

A person who can realize a profit or suffer a loss as a result of his or her services is generally an independent contractor, while the person who cannot is an employee. "Profit or loss" implies the use of capital by a person in an independent business of his or her own. The risk that a worker will not receive payment for his or her services, however, is common to both independent contractors and employees and, thus, does not constitute a sufficient economic risk to support treatment as an independent contractor. If a worker loses payment from the firm's customer for poor work, the firm shares the risk of such loss. Control of the firm over the worker would be necessary in order to reduce the risk of financial loss to the firm. The opportunity for higher earnings or of gain or loss from a commission arrangement is not considered profit or loss.

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.

Consideration has been given to the information provided by both parties to this work relationship. 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 and business reputation and to ensure its customers' satisfaction and that its contractual obligations were met. The worker was not operating a separate and distinct business; 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. 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. 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.

## CONCLUSION

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.