

**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 as a digital media specialist in tax years 2016 to the present, for which she received Forms W-2 and 1099-MISC. An Employment Agreement Update dated October 12, 2017 was signed by the worker and the firm's president. The position was Photography Tech and Assistant and entailed taking pictures and videos and editing using [REDACTED] and [REDACTED], before and after images, finding content for social media, posting on social media, and other digital media tasks as requested by the firm's owner and management. Details of daily responsibilities were to be communicated by the floor manager, operations manager, or the owner. The agreement referenced the non-compete and non-disclosure agreements and the provision of the firm's handbook. The firm's business is described as a lash extension and permanent make-up salon.

The firm's response was signed by the Director of Operations. The firm's business is a salon providing lash extensions and permanent make-up. The worker provided digital media services.

For tax years 2016, 2017, and the first 10 months of 2018 the worker was given Form W-2; and, in addition, the Form 1099-MISC was issued. According to the worker, her attendance at company events (information booths at public gatherings) were compensated separately (Form 1099-MISC). The firm indicated the Forms 1099-MISC represented bonus income in the earlier years.

On March 9, 2018 the worker submitted her letter of resignation because she was relocating. The worker stated that the following day she was approached by the firm's owner who acknowledged the worker's job was primarily on the computer and that working remotely should not impede her job. It was agreed the worker would continue as the firm's digital media specialist, although remotely. The firm continued to pay the worker as an employee for hours worked with applicable withholdings for taxes. In October 2018, the worker stated the firm contacted her to inform her that the firm's new accountant advised that the worker should be issued Form 1099-MISC. In that same conversation the firm increased the worker's hourly wage by \$X/hour; and, the worker continued to be paid at the increased hourly rate for editing and posting to social media sites as directed. The worker added that the firm continued to pay her the set fee per month for responding to social media posts. The worker stated that her job duties and tasks remained the same despite the relocation until her position was terminated in March 2020 due to changes within the firm's business resulting from Covid-19.

The firm's initial response stated the worker was a very good employee. Due to personal life changes the worker elected to move closer to family. In a telephone conversation, it was stated the firm's owner felt bad for her (the worker), so wanted to supply the worker with work; and, allegedly the bookkeeper mistakenly continued to pay the worker through the payroll system. In or about this same time, the firm's social media/marketing subcontractor, terminated their services with the firm and the worker assumed the additional tasks. In October of 2018, the firm engaged the services of a new accountant to perform bookkeeping and tax preparation services. At that time, it was questioned why the firm had an out-of-state employee and it was determined that the worker was misclassified as an employee after her employment termination; therefore, it was recommended that the firm reclassify her as a '1099 contractor'. The firm had a discussion with the worker at that time and the worker agreed with the position.

For over a year after the worker was re-classified, she continued to take instruction from and was provided with on-going work by the firm. The firm and worker concur the job assignments were conveyed daily/weekly via emails, texts, and phone calls. The worker had weekly, if not daily interaction with the firm's owner and/or Director of Operations as to the editing and uploading of the digital content, which was subject to the firm's approval. The worker also interacted with outside vendors, on behalf of the firm and at the request of the firm. The worker continued to provide a weekly summation of the work performed Monday through Friday from 9am to 3pm with an occasional Saturday and/or Sunday as well as the hours spent to accomplish the tasks. Both parties acknowledged the digital media work was paid at the hourly wage and the social media responses were paid at the set monthly fee. The worker was required to perform the services personally.

There were no benefits offered to the after she was reclassified. Either party could terminate the work relationship without incurring a liability or penalty. The firm indicated the worker was providing services for others during this time; the worker disagreed. The firm had opened a second salon which was being managed by the firm's owner's sister in April 2019. The worker continued to take direction from the firm and was under the assumption that both locations were operated by the firm, since the firm was providing directives as to advertising.



---

## 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.

A continuing relationship between the worker and the person or persons for whom the services are performed indicates that an employer-employee relationship exists. A continuing relationship may exist where work is performed in frequently recurring although irregular intervals; however, in this instance there was no break in service.

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.

We have considered 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; but, continued to provide services to the firm at the firm's request. 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. At the request of the firm the worker continued to perform her job tasks despite working remotely until the firm terminated the work relationship.

## 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. The worker should not have been reclassified.

Please see [www.irs.gov](http://www.irs.gov) for more information including Publication 4341 Information Guide for Employers Filing Form 941 or Form 944 Frequently Asked Questions about the Reclassification of Workers as Employees and Publication 15 (Circular E) Employer's Tax Guide.