

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

Occupation

Business/Computer Services/Office/Sales

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 submitted a request for a determination of worker status in connection with services performed for the firm in 2020 as a software tester and support worker. The firm issued the worker Form 1099-NEC for 2020. The worker filed Form SS-8 as he believes he received Form 1099-NEC in error.

The firm's response states it develops and sells proprietary software. The worker came to the firm and asked to be an independent worker as he was unable to work normal business hours on a full-time basis. The worker set his own schedule and worked when or if he wanted. In prior years he was employed as a support and sales person. There was no written agreement between the parties.

The firm stated that based on the worker's prior employment, he was familiar with the firm's procedures and the tasks he performed. The worker monitored the firm's tracking software which resulted in work assignments. The worker tested identified items and documented findings. The firm's standard operating procedure determined the methods by which assignments were performed. The firm's director of operations was contacted if problems or complaints arose; the director of operations was responsible for resolution. Reports included a weekly labor log of work performed. The copy provided documents the date, start time, finish time, total time spent, activity, and priority (high or low). It was signed by the worker and a manager. The worker performed services from his home and the firm's office on an as-able basis. The worker could attend weekly office meetings; there was no penalty if not attending. The firm required the worker to personally perform services. The worker stated the firm provided him basic training on its software.

The firm stated it provided a laptop and workstation, which was installed with the firm's software to use and test. The worker did not provide supplies, equipment, or materials. The worker did not lease equipment, space, or a facility. The worker did not incur expenses in the performance of services for the firm. Customers paid the firm. The firm paid the worker an hourly rate of pay; a drawing account for advances was not allowed. The firm did not carry workers' compensation insurance on the worker. The worker did not incur economic loss or financial risk. The firm and worker established the level of payment for the services provided. The worker stated the firm established the level of payment for the services provided.

The firm stated benefits were not available to the worker. The work relationship could be terminated by either party without incurring liability or penalty. The worker did not perform similar services for others or advertise. There was no agreement prohibiting competition between the parties. The firm did not represent the worker to its customers. The work relationship ended when the worker chose to stop performing services. The worker stated services were performed under the firm's business name.

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## Analysis

Generally, the relationship of employer and employee exists when the person for whom the services are performed has the right to control and direct the individual who performs the services, not only as to what is to be done, but also how it is to be done. It is not necessary that the employer actually direct or control the individual, it is sufficient if he or she has the right to do so.

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, coadventurer, agent, or independent contractor must be disregarded.

Therefore, the firm's statement that the worker was an independent contractor pursuant to a verbal 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. Furthermore, whether there is an employment relationship is a question of fact and not subject to negotiation between the parties.

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. In this case, the firm required the worker to personally perform services. Furthermore, the services performed by the worker were integral to the firm's business operation. The firm provided work assignments, determined the methods by which services were performed, and assumed responsibility for problem resolution. These facts evidence the firm retained the right to direct and control the worker to the extent necessary to ensure satisfactory job performance in a manner acceptable to the firm. Based on the worker's education, past work experience, and work ethic the firm may not have needed to frequently exercise its right to direct and control the worker; however, the facts evidence the firm retained the right to do so if needed.

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. In this case, the worker did not invest capital or assume business risks. The term "significant investment" does not include tools, instruments, and clothing commonly provided by employees in their trade; nor does it include education, experience, or training. As acknowledged by the firm, the worker did not incur economic loss or financial risk. Based on the hourly rate of pay arrangement the worker could not realize a profit or incur a loss.

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 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. Both parties retained the right to terminate the work relationship at any time without incurring a liability. There is no evidence to suggest the worker performed similar services for others as an independent contractor or advertised business services to the general public during the term of this work relationship. The classification of a worker as an independent contractor should not be based primarily on the fact that a worker's services may be used on a temporary, part-time, as-needed, or as-able basis. As noted above, common law factors are considered when examining the worker classification issue.

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.

The firm can obtain additional information related to worker classification online at [www.irs.gov](http://www.irs.gov); Publication 4341.