

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

Occupation

02LAW Law Staff

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 payer is a law firm. As the owner of the law firm, you engaged the worker as a law clerk. You reported the worker's remuneration on Forms 1099-MISC for 2016 and 2017.

You stated that worker responded to your ad on the school placement office bulletin board. You hired the worker with the understanding that she would provide services on a part-time irregular basis. Although you had some idea of the worker's work hours, they were often adjusted dependent upon her other interests and conflicts, breaks, and finals. Like all law clerks, the worker worked to gain experience and learn more about the practice. You acted as a mentor and advisor to your law clerks as to their options and even suggested courses they should take. You did not consider the worker as a full-time or part-time employee, but rather as an independent contractor who could come and go as she chose, could accept and refuse assignments, and could change her schedule at the last minute because of other priorities.

The worker stated that you provided training on basic office procedures, billable hours, and casework. You provided her with her work assignments and the methods by which to perform them. You were responsible for resolving any problems or complaints that may have occurred. The worker generally performed her service on your premises. It appears that she was required to perform her services personally.

You provided the office equipment and supplies. The worker utilized her personal laptop. You reimbursed the worker for any work related costs she incurred and paid her at an hourly rate. You did not cover the worker under workers' compensation. Customers paid your firm directly at prices that you established. The worker did not indicate the risk of incurring a financial loss beyond the normal loss of compensation.

You did not make benefits available to the worker. The worker did not advertise her services or provide similar services for others during the same time period. The worker performed her services under your firm's name. Both parties reserved the right to terminate the work relationship without incurring a penalty or liability, and in fact, the worker terminated the work relationship.

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**Analysis**

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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 an understanding 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, you provided the worker with training and served as her mentor. You were responsible for resolving any problems or complaints that may have occurred, showing you retained the right to change the worker's methods and to direct the worker to the extent necessary to protect your financial investment. The worker was required to perform her services personally, meaning that she could not engage and pay others to perform services for your 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 you 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. Lack of significant investment by a person in facilities or equipment used in performing services for another indicates dependence on the employer and, accordingly, the existence of an employer-employee relationship. These facts show that you 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. A continuing relationship may exist where work is performed in frequently recurring although irregular intervals. The worker was not engaged in an independent enterprise, but rather the services performed by the worker as a law clerk were a necessary and integral part of your law firm. 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. These facts show that you retained control over the work relationship and services of the worker.

Based on the above analysis, we conclude that you 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.