

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

Occupation 02LAW Patent Attorney	Determination: <input checked="" type="checkbox"/> Employee <input type="checkbox"/> Contractor
UILC	Third Party Communication: <input checked="" type="checkbox"/> None <input type="checkbox"/> 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 regard to services performed for the firm from September 2018 to November 2018 as a patent attorney. The work performed by the worker included patent prosecution. The firm issued the worker Form 1099-MISC for the year in question. The worker filed Form SS-8 as he believes he erroneously received Form 1099-MISC.

The firm's response states it is a law firm that specializes in intellectual property law, including patent prosecution and trademark prosecution. The worker was engaged as a patent attorney. He drafted patent applications and responses to office actions for the firm. From the beginning, it was made clear the firm was giving the worker an opportunity as an independent contractor. Services were performed under an independent contractor agreement. The agreement stated the firm would pay the worker 50% of his invoiced/billed hours. There was no regular wage or salary.

The firm stated it did not provide specific training or instruction to the worker. The worker received work assignments one job/project at a time. The firm determined the methods by which assignments were performed and assumed responsibility for problem resolution. Reports were not required. The worker had no scheduled hours. The worker performed services from his home or private office. The worker never performed services at the firm's office. There were no required meetings. The firm required the worker to personally perform services. The firm was responsible for hiring substitutes or helpers. It paid substitutes or helpers it hired. The worker stated the firm provided specific instruction on the protocol to be followed in connection with services performed and it trained him related to drawing software. The firm required he prepare time reports in the firm's billing system. He performed services on a regular, recurring basis. The firm required he participate in client phone interviews. If he didn't attend, he didn't get the job.

The firm stated it did not provide supplies, equipment, or materials. The worker provided and incurred the unreimbursed expense associated with his computer, office space, office furniture, Internet, phone service, office supplies, software, etc. The worker did not lease equipment, space, or a facility. Clients paid the firm. The firm paid the worker a percentage of invoice once per month, only after the work was invoiced to the client. There was no guaranteed minimum of pay. The worker was not allowed a drawing account for advances. The firm did not carry workers' compensation insurance on the worker. The worker's economic loss or financial risk related to business expenses incurred if money wasn't earned from services performed. The client established the level of payment for the services provided. The worker stated the firm provided a domain email account and client billing software. He provided a computer, keyboard, and monitor. He did not incur expenses in the performance of services for the firm. The firm determined his rate of pay as outlined in the independent contractor agreement. He did not incur economic loss or financial risk.

The firm stated benefits were not provided. The work relationship could be terminated by either party without incurring liability or penalty. As a patent attorney, the worker could not engage in activity that would conflict with the firm's clients. Other than that, there was no prohibition for him to work at any other law firm or his own firm. The worker advertised on LinkedIn. Written work products were sent to the firm's president. The firm represented the worker as a team member to its clients. Services were performed under the firm's business name. The work relationship ended when the firm terminated the written agreement. The worker stated he did not perform similar services for others or advertise. The written agreement contained clauses related to no conflict of interest and no solicitation. After a dispute related to worker classification, the parties ceased contact.

The independent contractor agreement states, in part, the worker would perform services in a prompt, diligent, and professional manner. The worker agreed to keep track of his time performing services and he would enter his time into the firm's billing system periodically, or at least weekly. The firm reserved the right to modify the services or redirect the services to be performed as the representatives of the firm changed. The agreement would continue until terminated by written notice by either party. The firm agreed to pay the worker 50% of his invoiced/billed hours as calculated by the firm's billing system. The firm set the worker's initial billing rate and could adjust the rate at any time. Invoiced hours also included the firm's involvement in reviewing and revising the work product. The firm could adjust the worker's time accordingly. During the agreement the worker would not engage in any activity which conflicted with the interest of the firm, or any of the clients served by the firm. While engaged by the firm and for two (2) years thereafter, the worker would not, directly or indirectly, approach or solicit any of the firm's clients for the purpose of competing with the firm, or causing, directly or indirectly, any such person to cease doing business with the firm. Neither party could assign the agreement without the prior written consent of the other party. The firm retained the right to assign its rights and obligations in the event of a corporate reorganization or in connection with a sale of substantially all of the firm's assets. The firm could include the worker in its brochure and website. The agreement could only be modified in writing signed by both parties.

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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 written 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.

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. Factors such as integration into the firm's organization, the nature of the relationship and the method of pay, and the authority of the firm to require compliance with its policies are the controlling factors. Yet despite this absence of direct control, it cannot be doubted that many professionals are employees.

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 by virtue of the clients served, determined the methods by which assignments were performed, required the worker to report on services 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.

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. 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 the worker presumably used his computer, Internet, and phone service for personal needs, these items are not considered a significant investment.

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, or as-needed 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.