

**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 is seeking a determination of worker classification for services performed as a law clerk for the firm from August 2020 until February 2021. The worker received a 1099-NEC from the firm for 2020. The worker states that they were misclassified by the firm as an independent contractor because they did not own their own business, did not work for multiple firms or advertise themselves, the firm set their schedule, and the firm had final say and supervision over the worker's job duties. There were no written agreements between the parties.

The firm states that it is a law practice. The worker was requested to perform services as a law clerk, which involved legal research, motion writings, and obtaining documents, amongst other duties. The firm classified the worker as an independent contractor because they had no control over the worker's hours, the worker performed services at the location of their choosing, the worker was free to work for others, the worker billed their hours to the firm by invoice, and the worker understood that they were being classified as an independent contractor. The firm provided an example of an invoice the worker provided to the firm for their hours worked and services performed.

The firm states that they instructed to worker to complete law-related tasks and did not provide the worker with any training. The worker received job assignments through email. The worker and firm mutually agreed upon how to accomplish job tasks. If the worker encountered any problems or complaints during their job duties, they were required to contact the firm owner for problem resolution. There were no reports required of the worker. The worker would decide when, where, and how to do their job assignments, as well as with what equipment they wished to use to accomplish all tasks. The worker was not required to attend any meetings and was not required to personally perform services. The worker was responsible for hiring and paying any helpers needed. The worker states that the firm provided the worker with instruction on job tasks and how they wanted them to be performed. The worker performed certain tasks and record keeping activities per the firm owner's instructions. The worker received job assignments through direct communication with the firm owner through email, text, or phone call. All work was performed remotely due to the pandemic. The firm owner determined the methods by which job assignments were performed. If the worker encountered any problems or complaints while working, they were required to contact the firm owner or their paralegal for problem resolution. There were no reports required of the worker. The worker performed services most days from 9am until 7pm. The worker usually worked a few hours each weekend. The worker would check status on time sensitive matters and prioritize assignments based on due dates. The worker would also check online filings, service of process, draft documents, and contact any clients. The worker would speak with the firm owner for updates. The worker performed all services at home due to the pandemic. The worker did not have to attend any meetings physically but would have daily meetings with the firm owner. The worker was required to personally perform services. The firm owner was responsible for hiring and paying all helpers needed.

The firm states that there were no supplies, materials, or equipment applicable. The worker did not lease any space, facilities, or equipment. The worker's only expenses were incidental transportation costs. The firm reimbursed the worker for transportation, copying service costs, and messenger service costs. The firm paid the worker an hourly wage upon submitting an invoice with their hours. The worker did not have access to a drawing account for advances. Customers paid the firm for services provided. The firm did not carry worker's compensation insurance on the worker. The worker faced no economic loss or financial risk. The worker and firm mutually agreed upon the level of payment for services. The worker states that the firm provided letterhead, envelopes, a computer, pdf software, and a file sharing program. The worker provided their home office, a printer, paper, and a computer. The worker did not lease anything and incurred no expenses. The firm reimbursed the worker for transportation, postage, and necessary software and programs. The firm paid the worker an hourly wage with no access to a drawing account for advances. Customers paid the firm. The worker's only economic loss risk would be due to the use of their personal computer to perform job duties. The firm owner established the level of payment for services provided.

The firm did not offer the worker any benefits. The relationship between the parties could be terminated by either party without liability or penalty. There were no non-compete agreements in place between the parties. The worker was not a member of a union. The firm represented the worker as a representative of the firm. The work relationship ended when the worker was hired full-time by a different firm. The worker states that they did not provide similar services for other firms. The worker was not a member of a union and did not advertise their services to the public. The worker was represented by the firm as an employee performing services under the firm's name. The worker quit after receiving an offer for full-time employment with a different firm.

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## Analysis

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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, a statement that a worker is an independent contractor pursuant to a written or 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 as a law firm. The firm provided work assignments by virtue of the customers served 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, day, 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. The firm reimbursed the worker for the only incidental costs that were associated with their job, including transportation and postage. 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, 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.