

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

Occupation 02OFF Business/Computers Services/Office/Sales	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**

It is our usual practice in cases of this type to solicit information from both parties involved. Upon the submission of the Form SS-8 from the worker, we requested information from the firm concerning this work relationship. The firm responded to our request for completion of Form SS-8.

From the information provided the firm is a weekly legal news publication that publishes municipal notices, mortgage foreclosures, and court docket info. The worker was engaged as a creative service provider providing services such as notarizing documents, graphic design services, and preparation of legal documents. The firm states they purchased the newspaper in October 2015 which at the time was a community type newspaper with periodicals and normal community news. However, in the fall of 2016, they switched their format to a legal and court news only publication. With that format switch, the firm states they also switched what types of "services" they were providing to their customers and readers.

The firm states the worker was a previous employee and was offered a job as an hourly employee when they purchased the paper in 2015. In the fall of 2016 the firm states they transitioned to a new format and therefore, they needed to change the way they did business. The firm states they also had no need for the employees they had and so these employees were either let go or they moved on to other employers. The firm offered the worker in this case the ability to still do work for them as a subcontractor if she agreed to provide some other outside services. The firm states they told the worker at that time that she would no longer be an employee of theirs and would be responsible for providing her own tools and supplies in order to provide services to them which included graphic design, legal document preparation, and notarizing documents. The firm states that some of these tasks the worker performed prior to the transition, however, she did so at an hourly rate of pay. The firm states that in order for this new agreement to work for them and the worker as a subcontractor, the worker needed to get new training and certifications to provide these new services to them. The firm states the worker did so on her own and she paid for those credentials herself. The firm states they compensated the worker on a per project basis after the transition and her services were reported on a Form 1099-MISC.

The firm states that the current services the worker performs is coincidentally similar to her previous hourly job, however they do not cover any of her personal costs to perform these services, she no longer has a schedule with them, and these services are required to be performed by a third party. The firm states the worker agreed to work for them as a subcontractor and not as an employee in September of 2016. The firm asked the worker to fill out a Form W-9 and they informed her they would not be withholding taxes from her earnings and that it would be her responsibility to do so. The firm states they have no obligation to use the worker's services and she has no obligation to provide those services to them.

The firm states the worker was instructed to provide services to them on specific deadlines. The worker received her assignments from the firm via email and the firm states they and the worker determined how the worker performed her services. The worker was required to notify the firm if there were any questions or issues that needed resolution. The firm states the worker was required to provide them with a legal report of work provided. The firm states the worker had no schedule and she received emails from different agencies and put together legal notices on her own time for them. The firm states that while the worker performed her services at their premises 75% of the time, she was not required to work at their premises. The worker was not required to attend meetings.

The firm provided a work space and computer to the worker in order to perform her services. The firm states the worker provided a cell phone, computer, and notary stamp. The firm states the worker incurred licensing fees for her services as a notary public and they did not reimburse the worker for any expenses she incurred. The firm states the worker could essentially be sued or prosecuted if the documents she prepared were found to be incorrect and therefore, she could incur a loss. The firm established the level of payment for the services provided based on state laws.

The worker was not eligible for employee benefits. The firm states the worker was free to do graphic design services for others which she did. The firm states they represented worker as a contractor. Either party could terminate the work relationship at any time without either party incurring a liability.

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## Analysis

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As in this case and in almost all worker classification cases, some facts point to an employment relationship while other facts indicate independent contractor status. The determination of the worker's status, then, rests on the weight given to the factors, keeping in mind that no one factor rules. The degree of importance of each factor varies depending on the occupation and the circumstances.

Evidence of control generally falls into three categories: behavioral control, financial control, and relationship of the parties, which are collectively referred to as the categories of evidence. In weighing the evidence, careful consideration has been given to the factors outlined below.

Factors that illustrate whether there is a right to control how a worker performs a task include training and instructions. In this case, the worker was experienced in this line of work as she had previously performed these services for the firm as an employee and therefore, the worker did not require training or detailed instructions from the firm. The need to direct and control a worker and her services should not be confused with the right to direct and control. The firm states both they and the worker determined how the worker completed her assignments. The worker provided her services on behalf of and under the firm's business name rather than an entity of her own. The firm was responsible for the quality of the work performed by the worker and for the satisfaction of their clients. This gave the firm the right to direct and control the worker and her services in order to protect their financial investment, their business reputation, and their relationship with their clients.

Subcontractors are truly independent of a firm and a firm's business. Some of the characteristics of subcontractors are that they will not consider a firm as their boss, they will have a contract for each job, they will carry their own insurance, they will pay their own helpers and labor costs, they will not have to personally perform their services but have the ability to have anyone they engage perform services since that person would be representing the subcontractor's business, and they would have their own business bank account and credit lines. Subcontractors will file tax returns and conduct themselves as real businesses. Subcontractors will dictate what services their business offers and how they process and perform those services, and how much it would charge for those services. A firm does not dictate how a worker will operate his or her own business, what services that business will offer, and what his or her responsibilities are. We did not find that the worker had this freedom or autonomy. There was no evidence presented and through our thorough research from various sources available to us, found no evidence that the worker operated a business, advertised her services to the public, had obtained a business license or had a business registration in the state which she performed services.

While the firm provided the worker with freedom of action as to when she performed her services, this in and of itself does not determine the worker's status as an independent contractor. The whole relationship needed to be analyzed to determine the worker's correct employment tax status.

Factors that illustrate whether there is 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. "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.

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. Both parties retained the right to terminate the work relationship at any time without incurring a liability.

If a firm has to make a worker "understand" or "agree to" being an independent contractor (as in a verbal or written agreement or the filing of a Form W-9), then the worker is not an independent contractor. An individual knows they are in business for themselves offering their services to the public and does not need to be made aware of, understand, or agree to be an independent contractor.

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, co-adventurer, agent, or independent contractor must be disregarded.

Therefore, 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.

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.