

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

Occupation

02OFF Office Worker

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 firm is a limited liability company in the business of digital innovation. The firm engaged the worker as a quality assurance engineer. There was a written agreement between the two parties. The worker filled out an application for the position.

The worker stated he received his assignments from the firm's team. The firm stated the worker relied upon another firm employee to resolve his problems and complaints. The worker stated he was required to submit weekly invoices to track his time. The firm stated the worker set his own hours as an independent contractor and the worker stated he had a set schedule. The worker performed his services at the firm's location. The worker was required to attend team meetings. The worker was required to perform his services personally.

The firm provided the worker with an office, office equipment and supplies. The worker was paid on an hourly basis. The customers paid the firm directly. The worker could not incur an economic loss of a financial risk while he performed his services. The firm established the level of payment for the services provided.

The worker received no benefits. Either party could terminate the relationship without incurring a liability. The worker did not perform similar services for others while he performed the same services for the firm. The firm stated the worker's services were terminated. The worker stated he was hired on full time as an employee for the same position as he performed as an independent contractor.

Consulting Agreement dated 9-28-2015.

The worker was required to comply with all of the firm's policies, rules, regulations, firm's conduct policy and to report to such persons as the firm may designate.

The worker was to perform quality assurance testing support and write functional, regression, end-to-end tests for applications/services.

Pay was \$30/hr.

Hours were not to exceed 40 per week without prior written notice from the firm (named a contact person).

Commencement date of 10-19-2015; expiration 12-31-2015.

The firm retained the right to terminate the worker at any time with or without cause.

There was a non-compete clause in the agreement.

There was an amendment to the above agreement dated effective 1-1-2016 to 3-31-2016 upholding the original agreement.

There was another amendment dated 4-1-2016 to 5-31-2016 that increased the hourly rate of pay to \$40/hr. and upholding the original agreement.

There were copies of the worker's invoices that showed the amount of hours he performed his services at the rate of pay set by the firm.

There was a Letter of Intent dated 5-5-2016 to extend an offer of employment to the worker for the same position that was listed on the Consulting Agreements. There would be a base salary of \$80,000/yr. The worker would receive benefits of health plan, 401K with matching contributions up to 6% vesting over 5 years, life & disability insurance, flexible spending accounts and commuter benefits with 3 weeks of paid time off. A performance bonus of 10% of base salary contingent upon performance. The start date would be 5-23-2016. This was signed by the Chief Digital Officer.

The worker provided a copy from the employment development department showing he did receive unemployment benefits.

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## Analysis

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As is the case 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.

Your 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.

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. In the instant case the worker was a quality assurance engineer for the firm's company which demonstrated the worker's services were integrated into the firm's daily operations.

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 the instant case the worker was required to perform his services personally as an employee.

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. In the instant case the worker was paid by the hour and then by salary and in both instances the firm set the hourly/salary rate of pay in an employer-employee relationship.

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. 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. Also, if the firm has the right to control the equipment, it is unlikely the worker had an investment in facilities. In the instant case the worker did not have a significant investment in the performance of his duties as the firm provided all of the worker's needs to perform his services.

The right to discharge a worker is a factor indicating that the worker is an employee and the person possessing the right is an employer. An employer exercises control through the threat of dismissal, which causes the worker to obey the employer's instructions. An independent contractor, on the other hand, cannot be fired so long as the independent contractor produces a result that meets the contract specifications. The firm did retain the right to discharge the worker with or without cause as an employer.

The worker was an employee according to common law. The information provided by both parties showed the worker's services did not significantly change from the time he was paid as an independent contractor to the time he was paid as an employee. The worker relied upon the firm to resolve his problems and complaints which showed the worker was dependent upon the firm as an employer. The fact the worker was required to perform his services personally demonstrated the firm was interested in the methods used as well as the end result as an employer. The firm provided the worker with an office, office supplies and equipment for the worker to perform his services. The firm set the hourly and then the annual pay scale for the worker which showed financial control. The worker performed services as a quality assurance engineer for the firm's business which demonstrated the worker's services were integrated into the firm's daily operations. The fact the firm retained the right to discharge the worker showed control over the worker through the threat of dismissal.

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.

Please go to [www.irs.gov](http://www.irs.gov) for further information.

Firm: Publication 4341

Worker: Notice 989