

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

Occupation

02OFF Office Workers

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 submitted a request for a determination of worker status in regard to services performed for the firm from January 2016 to January 2018. The work done by the worker included research and data entry. The firm issued the worker Form 1099-MISC for 2016 and 2017. The worker filed Form SS-8 as she believes she erroneously received Form 1099-MISC. The worker believes she was an employee as the firm trained her, required her to work set hours, directed her on specific ways in which to perform job duties, and determined where she performed services. The worker had to request time off.

The firm's response states its business is pre-employment screening, i.e. wholesale criminal background checks. The worker was engaged as a researcher. She traveled to the local county courthouse to perform criminal background checks on public access terminals and then entered information into a database which was reported to the firm's clients. The worker was an independent contractor as she performed tasks during the hours and days and in the manner she determined. The firm defined the output or deliverable or report format to be provided by the worker but not the how, when, or where. There was no written agreement between the parties.

The firm stated it did not provide specific training or instruction to the worker as very little training was required for the position. The worker learned how to access the court system from court personnel or other independent contractors. The firm communicated work assignments electronically or through the worker's periodic visits to the firm's office. The firm determined the output or deliverable or report format. The worker was not contacted with complaints. The worker's review of documents, via the court public access terminal, was reported and entered into a database. As the court is open from 8:30 am to 4:30 pm, research could be performed during those hours. Services were performed at the courthouse, firm's premises, and other locations chosen by the worker. Meetings were not required. The firm required the worker to personally perform services. Hiring substitutes or helpers was not applicable. The worker stated the firm's owner instructed another worker to train her. The firm provided specific instruction related to work assignments and her daily routine, i.e. arrive at the firm's office by 8 am, pick up the day's work assignments collected from the firm's computer system by its office manager, travel to the designated courthouse, and report to the firm's owner the workload for the day. After the research work was completed, she would then return to the firm's office and report to the firm's owner what had been completed and what needed to be completed. The firm would then instruct her to enter the results collected. Work was performed until it was finished or 4 pm. Services were performed Monday through Friday. The firm determined the methods by which assignments were performed and assumed responsibility for problem resolution. The firm required the worker to prepare billing sheets. Services were performed at the firm's premises 40% of the worker's time and at the courthouse 60% of her time. The firm required her to attend staff meetings as scheduled. The firm was responsible for hiring and paying substitutes or helpers.

The firm stated it provided paper and pens. The worker provided anything else she felt she needed. The worker did not lease equipment, space, or a facility. The worker did not incur expenses in the performance of services for the firm. Customers paid the firm. The firm paid the worker an hourly rate of pay; a drawing account for advances was not allowed. The firm did not carry workers' compensation insurance on the worker. The worker did not incur any material risk of loss. The worker stated the firm provided work materials such as a computer, desk, access to various databases, binder to hold work in, scanner/printer, office supplies, office phone, and firm email. The firm established the level of payment for the services provided.

The firm stated the work relationship could be terminated by either party without liability or penalty. The firm's approval was not required for the worker to perform similar services for others. There was no agreement prohibiting competition between the parties. The worker did not advertise. The firm did not represent the worker to its customers. The work relationship ended when the worker terminated services to attend school full-time. The worker stated the benefit of holiday bonuses were paid to her. She did not perform similar services for others. The firm represented her as an employee/researcher to its customers. Services were performed under the firm's business name. The worker quit.

Both parties agreed the worker was not responsible for soliciting new customers.

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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, 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 research and data entry services performed by the worker were integral to the firm's business operation. 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 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, 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. As acknowledged by the firm, the worker did not incur expenses in the performance of services and she had no material risk of loss. 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.