

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

Occupation

02OFF QA Analyst/Software Tester

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 2017 to June 2019, as a quality assurance analyst. The worker's duties included testing software products for the firm's clients. The firm issued the worker Form 1099-MISC for tax years 2017, 2018, and 2019. The worker filed Form SS-8 as he believes he erroneously received Form 1099-MISC.

The firm's response states that the business specializes in information technology development and services. The worker was classified as an independent contractor due to being able to set his own work hours. There was a written agreement between the two parties.

The worker received specific training and/or instruction from the firm's client. The worker received work assignments from the firm's client. The firm's client determined the methods by which assignments were performed. The worker was required to contact the firm for problem or complaint resolution. Meetings and reports were required by the worker. The worker's schedule was 8:00 AM to 5:00 PM (M-F). The worker provided services remotely. The hiring of substitutes or helpers was the firm's responsibility. The firm and worker disagree on if services performed by the worker were required to be personally provided.

The firm's client provided all supplies, equipment, materials, and property. The worker provided nothing. The worker did not lease any equipment, space, or a facility from the firm. The type of pay received by the worker was piece work; a drawing account for advances was not allowed. The firm responded that the worker established the level of payment for the products sold, but customers paid the firm. The worker did not incur an economic loss or carry a financial risk. The worker was covered by the firm's workers' compensation insurance plan.

The worker received no benefits from the firm. The work relationship could be terminated by either party without incurring a liability or penalty. The worker did not perform similar services for others during this work relationship. The worker was not a member of a union. The firm ended the work relationship.

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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 they have 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 verbal or 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.

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 this case, the worker was integral to the payer's business operation. The payer provided work assignments by virtue of the clients served, determined the methods by which assignments were performed, and assumed responsibility for problem resolution. These facts are evidence that the payer retained the right to direct and control the worker to the extent necessary to ensure satisfactory job performance in a manner acceptable to the payer. Based on the worker's education, past work experience, and work ethic the payer may not have needed to frequently exercise its right to direct and control the worker; however, the facts are evidence that the payer 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 payer 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 payer has the right to direct and control the performance of the workers. In this case, the worker did not invest capital or assume business risks. Based on the pay arrangement the worker could not realize a 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, but rather the services performed by the worker were a necessary and integral part of the payer'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.

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.

Based on the above analysis, we conclude that the payer 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 payer can obtain additional information related to worker classification online at [www.irs.gov](http://www.irs.gov); Publication 4341 and Publication 9266.