

**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 2018 to July 2019 as an office manager. The services performed included working record requests and office work such as responding to emails, providing status updates to clients, processing all incoming orders, entering order and client information into the firm's management software system, designing and maintaining an electronic filing system for work-in-progress, designing company forms, redesigning the firm's website, writing and editing social media posts and bulk emails, delivering finished files to clients, etc. The firm issued the worker Form 1099-MISC for 2018 and 2019. The worker filed Form SS-8 as she believes she received Form 1099-MISC in error. She also disputes the amounts reported on Form 1099-MISC.

The firm's response states its business is military and government record retrieval. It also sells genealogy themed apparel online. The worker was engaged to retrieve records and assist with office work, which included answering emails, adding/editing/delivering/closing orders in the client management software, graphic design, and website modification. The worker was classified as an independent contractor as she owns an apparel design and printing company, signed Form W-9, performed office work for others, and may have performed similar services for others. The worker drew up a contract in June 2019, which was never signed, that stated she was not an employee. The parties had verbal agreements in connection with compensation to be paid for services performed.

The firm stated it did not provide the worker specific training or instruction. The worker learned the firm's management software on her own over time. The firm provided work assignments to the worker. The worker determined how and when assignments were performed. The firm was contacted and ultimately assumed responsibility for problem resolution. The firm required the worker to provide work logs for payment calculation purposes; however, they were rarely provided. A copy was attached for our review. As the firm had no control over the worker's daily routine, her schedule was unknown to the firm. For a period, there was a verbal agreement where the worker would work a fixed number of hours per week. Services were performed at an archive location and the worker's home. Meetings were not required. The firm did not require the worker to personally perform services. The worker was responsible for hiring and paying substitutes or helpers. The worker stated the firm provided her general instruction on military research and use of scanning and copying equipment and methods. Work specifications were determined by the firm. Reports also included monthly expense reports with receipts. Copies were attached for our review. Her routine consisted of office work on Monday, Wednesday, and Friday; copying records at the archive facility on Tuesday and Thursday. An extra day at the archive facility was added, if needed, based on volume. Meetings were not required; however, the firm expected her to be available by phone at all hours. The firm required she personally perform services. The firm was responsible for hiring and paying substitutes or helpers.

The firm stated it provided an external hard drive and access to its company email. The worker provided a computer, laptop, camera, scanner, and anything else required. The worker did not lease equipment, space, or a facility. The firm reimbursed the worker for copies as needed. Customers paid the firm. The firm paid the worker commission; a drawing account for advances was not allowed. The firm did not carry workers' compensation insurance on the worker. The worker did not incur economic loss or financial risk. The worker established the level of payment for the services provided. The worker stated the firm also provided a flatbed scanner, passwords for its website, email, and some research sites, and business cards. The firm also reimbursed her for one tank of gas per month. The firm paid her a fixed weekly rate of pay, in addition to commission, from June 2018 to March 2019. The firm established the level of payment for the services provided.

The firm stated the work relationship could be terminated by either party without incurring liability or penalty. The worker performed similar services for others; the firm's approval was not required for her to do so. There was no agreement prohibiting competition between the parties. The worker advertising was not applicable. The firm's office email represented the worker as an office manager to its customers. The work relationship ended when the worker quit. The worker stated benefits were not made available. The firm prohibited her from performing similar services for others. She did not perform similar services for others. The firm represented her as an employee to its customers. Services were performed under the firm's business name. She quit due to lack of payment from the firm.

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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, the firm's statement that the worker was an independent contractor pursuant to a 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.

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 research and office support services performed by the worker were integral to the firm's business operation. The firm provided work assignments by virtue of the customers served, required the worker to report on services performed, 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.

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. 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 economic loss or financial risk. Based on the fixed weekly rate of pay and commission 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.