

SS-8 Determination—Determination for Public Inspection

Occupation 02PDP Publishers/Editors/Producers	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

The firm is in the business of TV production. The firm engaged the worker as an editor. It reported the worker's remuneration on Forms 1099-MISC for 2015 through 2017.

The firm submitted an agreement between the parties commencing on June 8, 2015, stating, among other things, that the worker will perform all typical editorial duties in consultation with Co-Executive Producer(s) and Executive Producer(s); the worker will furnish his own tools, materials, and equipment for providing the services; the worker has the complete and sole discretion for the manner in which the services will be performed; the worker enters into the agreement, and shall continue to be, an independent contractor; the firm will record all payments to the worker on Form 1099-MISC and will not withhold any state or federal withholding taxes on the worker's behalf; the worker will be solely responsible for all taxes, and will submit all income taxes on a quarterly basis, or in accordance with applicable law, and provide the firm with proof of payment upon demand; the worker will be responsible for any disability, workers' compensation, or other insurance, as well as licenses and permits; the worker will render services at a third party location and agrees to work without supervision; the worker represents that he has the qualifications and ability to perform the services in a professional and competent manner, without the control or supervision of the firm; the worker will determine his schedule and understands that the services must comport with the firm's established protocols and security requirements; the worker will be paid a flat fee of \$3,500 per episode edited and delivered; the worker must submit invoices on the 1st and 15th of every month on the worker's business letterhead; the firm will pay the worker \$2,000 as a stipend for relocation expenses to the firm's production facility; the worker may represent, perform services for, or be employed by additional persons or companies; and either party may terminate the agreement at any time, for any reason, by giving one week's written notice.

Information from the parties supports that the firm provided the worker with episode material to be edited. Any questions went to the worker's contact person. The worker was not required to submit reports, only the finished edited episodes. The worker's schedule varied according to his timing; he could edit as fast or as slow as he wanted to. The worker generally worked at the firm's office, but sometimes at his house. The worker was not required to attend meetings. He was not required to perform his services personally. If substitutes or helpers were needed, the worker was responsible for hiring and compensating them.

The firm stated that the worker edited on his choice of equipment, and that the worker utilized his own computer and software. The worker stated that the firm provided the office, computer, and all software that he used to perform his services. Customers paid the firm directly. Neither party indicated an investment by the worker in the firm or a related business.

The firm did not make benefits available to the worker. There is no evidence submitted showing the worker advertised his services or maintained a business listing.

Analysis

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 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.

Factors that illustrate whether there was a right to control how a worker performed a task include training and instructions. In this case, while the firm relied upon the worker's prior training and experience to perform his services, he worked in consultation with Co-Executive Producer(s) and Executive Producer(s). The firm retained the right to change the worker's methods and to direct the worker to the extent necessary to protect its financial investment. The firm paid the worker to relocate to another state and the worker generally performed his services on the firm's premises. If the work is performed on the premises of the person or persons for whom the services are performed, that factor suggests control over the worker, especially if the work could be done elsewhere. The worker was required to submit bi-weekly invoices. A requirement that the worker submit regular or written reports to the person or persons for whom the services are performed indicates a degree of control. There is no indication that the worker engaged and paid others to perform services for the firm on his behalf. These facts show that the firm retained behavioral control over the services of the worker.

Factors that illustrate whether there was 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. 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 worker could have utilized his own computer and software; however, 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. The firm paid the worker per episode edited and delivered, and the risk of loss beyond the normal loss of compensation was absent. These facts show that the firm retained control over the financial aspects of the worker's services.

Factors that illustrate how the parties perceived 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 were part of the service recipient's regular business activities. In this case, the worker performed his services on a continuing basis. The worker was not engaged in an independent enterprise, but rather the editing services performed by the worker were a necessary and integral part of the firm's TV production business. 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. The worker could have performed similar services for others during the same time period; however, it is possible for a person to work for a number of people or firms concurrently and be an employee of one or all of them. In this case, the firm had top priority on the worker's time and efforts. These facts show that the firm retained control over the work relationship and services of the worker.

Often the skill level or location of work of a highly trained professional makes it difficult or impossible for the firm to directly supervise the services so the control over the worker by the firm is more general. Factors such as integration into the firm's organization, the nature of the relationship and the method of pay, and the authority of the firm to require compliance with its policies are the controlling factors. Yet despite this absence of direct control, it cannot be doubted that many professionals are employees.

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.