

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

Occupation

Business/Computer Services/Office/Sales

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 leading provider of outsourced training and e Learning solutions for Fortune 500 companies. The firm partners with its clients to develop and deliver high impact learning solutions that are custom designed to deliver engaging learning experiences. These experiences are tied to solid learning objectives which maximize employee retention and promote the practical application of knowledge and skills. The firm engaged the worker as a Senior Operations Manager from 03/2017 to 03/2018. The firm described her duties as she would source candidates, schedule interviews and on-board consultants. This was pursuant to a written agreement between the parties. The firm provided us a copy of the Independent Contractors agreement. The worker submitted a Form SS-8 after receiving a Form 1099-Misc from the firm. The firm replied with a Form SS-8.

The worker stated she received limited training on how to use LinkedIn Recruiting. She was also given instructions on how the work was to be performed. She would receive her work assignments from the Director of Operations occasionally if she needed help or something done urgently. However, the firm stated she would receive her assignments from external client request. In the agreement provided to us by the firm, she would perform duties that would be assigned to her by the company's managing director. Secondly, she was required to always adhere to the company's directives and report to her supervisor. Also stipulated in the agreement, all customers that would become the firm's clients would remain the firm's clients. In addition, she was required to use the company email for all client and company communications. The Director of Operations determined the methods by which those assignments were performed. According to the worker she was given set hours and was required to work a 40-hour week. She would work 7:00 am to 3:30 pm. She would log onto Google Hire and view the previous night's recruiting activity. She would respond to emails, communicate with candidates at various stages and help facilitate discussions. According to the firm, the worker's schedule was flexible. She received regular remuneration for her services. The worker was required to contact the Director of Operations if any problems or complaints arose for resolution. She was required to submit time-sheets. The worker worked remotely from her home providing her services to the firm. The worker stated she was required to attend staff meetings although the firm stated meetings were not required. The relationship between the parties was continuous, as opposed to a one-time transaction. The nature of this relationship contemplated that the worker would perform the services personally. The worker worked exclusively and on a continuing basis for the firm. Her services were an integral and necessary part of the services the firm provided to its clients. The firm specified substitutes and helpers were not required.

The parties differ over who provided supplies and equipment. The worker stated the firm supplied her with a computer and printer. However, the firm, stated it did not provide the worker with anything. The worker did not lease equipment. The worker did not incur any significant business expenses. She stated she was reimbursed for a printer that she had been required to purchase. The worker was paid an hourly wage. The firm did not allow the worker a drawing account, or advances against anticipated earnings. The firm's clients paid the firm. The firm specified it did carry worker's compensation insurance on the worker. The worker did not have a substantial investment in equipment or facilities used in the work and did not assume the usual business risks of an independent enterprise.

The worker was not eligible for sick pay, vacation pay, health insurance, or bonuses. She did specify she received personal days from the firm. Either party may terminate the work relationship at any time without incurring a penalty or liability. There was a "non-compete" agreement between the parties. The worker was not a member of a union. According to internal research, the worker did not perform the services for others. She did not advertise her services to the public or maintain an office, shop, or other place of business. She was required to perform the services under the name of the firm and for the firm's clients. The relationship between the parties ended when the worker was laid off due to financial constraints of the firm. According to the firm the contract between the two parties had ended.

The information submitted on the Form SS-8 and the internal research conducted provided enough information to provide a determination for this case. The facts of the case indicate that the firm had the right to control the worker.

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## Analysis

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In determining whether an individual is an employee or an independent contractor under the common law, all evidence of both control and lack of control or independence must be considered. We must examine the relationship of the worker and the business. We consider facts that show a right to direct or control how the worker performs the specific tasks for which he or she is hired, who controls the financial aspects of the worker's activities, and how the parties perceive their relationship. The degree of importance of each factor varies depending on the occupation and the context in which the services are performed.

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.

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.

A continuing relationship was established rather than a one-time transaction taking place. A continuing relationship may exist where work is performed in frequently recurring although irregular intervals. The existence of a continuing relationship indicates an employer/employee relationship was established.

While the firm provided the worker with freedom of action as to when she performed her services, this in and of itself does not determine the worker's status as an independent contractor. The whole relationship needed to be analyzed to determine the worker's correct employment tax status. An important factor of determining a worker's status is who had the contractual relationship with the client and whom did the client pay. In this case, that relationship was between the firm and their clients.

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.

The firm determined the rates charged to the customers and the customers paid the firm's business directly for the services provided by the worker. The worker was not allowed a drawing account against future earnings. The worker was provided remuneration in the form of an hourly wage and it was the firm who determined the worker's method of payment and paid the worker as an individual and not to a business account.

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, both parties retained the right to terminate the work relationship at any time without incurring a liability.

Based on the common-law principles, the firm had the right to direct and control the worker. The worker shall be found to be an employee for Federal tax purposes.

The firm can obtain additional information related to worker classification online at [www.irs.gov](http://www.irs.gov); Publication 4341.