

SS-8 Determination—Determination for Public Inspection

Occupation 04MAN Managers/Supervisors	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

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Facts of Case

The firm is a bamboo startup with a mission to advance the use of bamboo as a mainstream timber alternative building material. The firm engaged the worker to assist with the formation of a joint venture in the designated country, communicate with local authorities, and search for a viable factory and raw supply. The firm stated that the worker was a Director with the joint venture. The firm reported the worker's remuneration on Forms 1099-MISC for 2015 and 2016.

The firm provided the "Mutual Non-Disclosure, Non-Compete, Non-Circumvention, Confidentiality Agreement", signed by the worker on September 9, 2014 stating, among other things, without the prior consent of either party, which may be withheld from either party, the parties shall not establish and/or operate any business in direct competition with either party; service or solicit business included in the business of either party, or client, or associate company; request or advise any customer of either party to withdraw, curtail, or cancel such customer's business with the other party; solicit for employment any person employed by either party; contact persons or entities engaged in a business relationship with the other party regarding any matter concerning or affecting the business of the other; solicit or propose a business relationship between persons or entities engaged in a business relationship with either party, or third parties without compensating the other party, and any person/company that is introduced by one of the parties cannot be contacted by the parties either directly or indirectly without the consent of the introducing party; any materials generated in connection with the agreement must be returned to the other party within 10 days after termination or at the written request of the disclosing party; and the commitments of each party will survive any termination of the agreement for 5 years.

The firm also submitted the initial and subsequent independent contractor agreements effective through September 2016, stating the "Focus", "Supervisor", "Description of Work", "Deadlines/Milestones": As Directed by the President of the Company, "Compensation": Consulting Fee to be paid a flat rate per month for consulting work which was increased in May 2016, and "Expenses": Travel, lodging and meals are to be approved in advance by the Supervisor, and will be reimbursed upon receipt of the back-up documents and an expense report, due within 30 days of the expense incurred.

Information from the parties supports that the firm relied upon the worker's prior training and experience to perform his services. The worker's work assignments were based on weekly conference calls at which time all involved received work assignments. Problems were discussed during the weekly phone calls; if the worker could not resolve the problem, the President or CEO would assist with its resolution. As the worker worked out-of-country, he set his own schedule. He worked from his home office or he traveled to meetings. The worker was required to perform his services personally.

The worker utilized his personal computer, office supplies, and cell phone. The firm reimbursed the worker for travel, meals, and cell phone charges. Neither party indicated an investment by the worker in the firm or a related business, or the risk of the worker incurring a financial loss beyond the normal loss of compensation other than the risk of loss of his computer or cell phone.

The firm did not make benefits available to the worker. Both parties reserved the right to terminate the work relationship without incurring a penalty or liability. The worker did not advertise his services or provide similar services for others during the same time period. He performed his services under the name of the joint venture. The firm terminated the work relationship when the firm was not funded as expected.

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. If a firm has to make a worker "understand" or even if a worker "agreed to" being an independent contractor (as in a verbal or written agreement), this factor does not determine the worker's status as an independent contractor. An individual knows they are in business for themselves offering their services to the public and does not need to be made aware of, understand, or agree to be an independent contractor.

Generally a non-compete agreement indicates the employer is exercising the kind of control over the worker that an employer would exercise over an employee rather than an independent contractor. An independent contractor is expected to work for other entities, usually at the same time as he or she is working for the employer.

Factors that illustrate whether there was a right to control how a worker performed a task include training and instructions. In this case, the firm provided the worker with his work assignments and was ultimately responsible for resolving any problems that may have occurred, showing it retained the right to change the worker's methods and to direct the worker to the extent necessary to protect its financial investment. Although the worker determined his work schedule, the expectation was that he would provide services on a full-time basis. If the worker must devote substantially full-time to the business of the person or persons for whom the services are performed, such person or persons have control over the amount of time the worker spends working and, therefore, the worker is restricted from doing other gainful work. An independent contractor, on the other hand, is free to work when and for whom he or she chooses. The worker was required to perform his services personally, meaning that he could not engage and pay others to perform services for the firm on his behalf. 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. 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 utilized his personal computer and cell phone. There is no evidence to suggest the worker's computer and phone were purchased exclusively for business purposes. Presumably these items were also used by the worker for his personal needs; therefore, they are not considered a significant business investment. The firm paid the worker at a monthly rate and the risk of loss was absent. It reimbursed him for work-related expenses. If the person or persons for whom the services are performed ordinarily pay the worker's business and/or traveling expenses, the worker is ordinarily an employee. An employer, to be able to control expenses, generally retains the right to regulate and direct the worker's business activities. 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 services performed by the worker were a necessary and integral part of the firm's 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 business. Although the firm did not make benefits available to the worker, the firm terminated the work relationship without incurring liability or penalty. The right to discharge a worker is a factor indicating that the worker is an employee and the person possessing the right is an employer. These facts show that the firm retained control over the work relationship and services of the worker.

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.