

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

Occupation

04MAN Tour Guide/Manager

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**

Information provided indicated the firm is a Segway tour business. The worker was responsible for escorting tours and was paid an agreed upon amount based on the tour size. The services were performed in 2017 and 2018. The firm issued Form 1099-MISC for tax years 2018. Both parties provided a copy of the independent contract agreement. The firm indicated he was trained how to operate the Segway as well as safety precautions. Work assignments were based on tours booked. He had first selection to take the tours out. He reported what the bookings were. All tours were based in and around [REDACTED]. General meetings with the owner were required, there were no penalties for not attending. The firm provided all equipment, chargers and safety equipment. The customer paid the firm. The firm created the contract that was mutually agreed upon and signed. Either party could terminate the work relationship without incurring a penalty or liability. He was represented as a tour guide for the firm. The firm indicated the worker abandoned the job. The firm stated there had been a discrepancy as to the number of bookings conducted and those actually paid for.

The contract provided by the firm indicated the firm owner gave the worker permission to refuse business from anyone, for any reason, safety being the number one rule. It stated the worker would be liable for damages or repairs to equipment for any reason during or after the contracted work term. The worker would manage the business to the best of his ability. It also includes the pay rate for training, tours etc.

The worker stated he had been assigned a weekly schedule (copies were provided for substantiation) and was responsible for conducting any tours that had been booked during his assigned time slot. He was given the online software to observe bookings and contact and charge customers, send them the digital waivers in advance of their arrival. He was expected to arrive a half hour early for tours and set up all equipment. He had a key to open and close the shop. He The firm provided the credit card software to take payments. He also performed retail sales. He was not allowed to deviate from the set route, giving the same verbal information on each. The firm hired and paid all workers. All substitutes were to be approved by the firm. The worker indicated he was fired.

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## Analysis

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The question of whether an individual is an independent contractor or an employee is one that is determined through consideration of the facts of a particular case along with the application of law and regulations for worker classification issues, known as “common law.” Common law flows chiefly from court decisions and is a major part of the justice system of the United States. Under the common law, the treatment of a worker as an independent contractor or an employee originates from the legal definitions developed in the law and it depends on the payer’s right to direct and control the worker in the performance of his or her duties. Section 3121(d)(2) of the Code provides that the term “employee” means any individual defined as an employee by using the usual common law rules.

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.

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.

Therefore, your 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.

We have applied the above law to the information submitted. As is the case in almost all worker classification cases, some facts point to an employment relationship while other facts indicate independent contractor status. The determination of the worker’s status, then, rests on the weight given to the factors, keeping in mind that no one factor rules. The degree of importance of each factor varies depending on the occupation and the circumstances.

Evidence of control generally falls into three categories: behavioral control, financial control, and relationship of the parties, which are collectively referred to as the categories of evidence. In weighing the evidence, careful consideration has been given to the factors outlined below.

Factors that illustrate whether there is a right to control how a worker performs a task include training and instructions. In this case, you retained the right to change the worker’s methods and to direct the worker to the extent necessary to protect your financial investment.

Factors that illustrate whether there is 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.

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 your business. Both parties retained the right to terminate the work relationship at any time without incurring a liability.

Conclusion: 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. We find the services performed were a necessary and integral part of the firm's business. The worker was responsible for opening and closing the retail establishment. His duties included retail sales, performing the booked tours, to include orientation for each client, on how to use the equipment. He was required to follow all rules and regulations of the firm, pertaining to the use and training of the safety equipment. The firm provided all equipment and safety gear, credit card machine for payment, software for booking purposes. All work was performed, as scheduled by the firm, under the firm's business name. The firm determined the rates charge per tour package. The firm determined the tour routes to be followed.