

SS-8 Determination—Determination for Public Inspection

Occupation Managers/Supervisors/Administrators	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 a college. The firm engaged the worker as a festival director for its film festival from 10/2020 to 5/2021. This was pursuant to a written agreement between the parties. The worker submitted a Form SS-8 after receiving a Form 1099-Misc from the firm. The firm replied with a Form SS-8.

According to the worker, she received instructions from the firm. She was responsible for soliciting film submissions. She also was responsible for establishing community partners and contacting professors and students for film submissions. She was required to consult with her supervisor and associated festival director on determining jurors and managing the juror process. She would also coordinate with her supervisor on updating the festivals website. She stated she received her work assignments from her supervisor. Her supervisor assigned her tasks related to film submissions and the promotion of the festival. She indicated her supervisor determined the methods by which those assignments were performed. The firm was responsible for problem resolution. She stated in the beginning she would work several days a week on submitting submissions and putting together the various components of the festival. As the festival approached, she worked 4-5 days a week. The worker was required to set up and maintain bookkeeping records in accordance with the firm's procedures. She performed the services at her home. The firm asserted the worker's schedule and hours were at the discretion of the worker. According to the firm the worker was not required to attend any meetings. The worker did assert she had virtual meeting with her supervisor to discuss progress. 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 festival.

According to the worker, the firm provided her with contacts, access to Zoom links and communication department resources. She only provided her laptop. The worker did not lease equipment. The firm determined the fees to be charged. The worker did not incur any significant business expenses and was not reimbursed by the firm. The worker was paid a set price for the services she provided. This was split up into two payments. She received 50% after the contract was executed and 50% was paid to her at the completion of the event. The firm did not allow the worker a drawing account, or advances against anticipated earnings. The firm did not 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. Either party could terminate the work relationship at any time without incurring a penalty or liability. The firm indicated if they terminated the contract for convenience, they would reimburse the worker for all accrued fees and authorized expenses. There was not 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 during the term of this work relationship. 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. The relationship between the parties ended when the worker completed the job.

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.

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.

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.

A worker who is required to comply with another person's instructions about when, where, and how he or she is to work is ordinarily an employee. This control factor is present if the person or persons for whom the services are performed have the right to require compliance with instructions. Some employees may work without receiving instructions because they are highly proficient and conscientious workers or because the duties are so simple or familiar to them. Furthermore, the instructions, that show how to reach the desired results, may have been oral and given only once at the beginning of the relationship.

A continuing relationship between the worker and the person or persons for whom the services are performed indicates that an employer-employee relationship exists. A continuing relationship may exist where work is performed in frequently recurring although irregular intervals.

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. Also, workers are assumed to be employees if they are guaranteed a minimum salary or are given a drawing account of a specified amount that need not be repaid when it exceeds earnings.

We have considered the information provided by both parties to this work relationship. In this case, 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 and business reputation and to ensure its customers' satisfaction and that its contractual obligations were met. The worker was not operating a separate and distinct business; 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.

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; Publication 4341.