
SS-8 Determination—Determination for Public Inspection

Occupation

MAN - Managers / Supervisors

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 worker is seeking a determination of worker classification for services performed for the firm as a player support manager from September 2024 until February 2026. The worker filed a Form SS-8 because they are unable to get worker's compensation benefits.

The worker states that they were responsible for providing customer support to the firm's customers. The worker believes that they were an employee of the firm because they were not free from the firm's control and direction, and work was not performed outside of the usual course of the firm's business. The worker provided a screenshot of the job advertisement with job description, the written "Contractor Agreement" between the parties, and invoices from the worker to the firm for 2024-2026.

The firm states that they provide mobile game development services by developing and publishing entertainment applications for mobile phones. The worker provided services for the firm as a customer service representative, responding to customer emails about issues with the application and using tools to address issues such as providing in-game materials or approving refunds. The firm classified the worker as an independent contractor because the worker maintained their own hours and used their own equipment, the worker had agency to handle issues with minimal supervision, the worker was free to provide similar services to others, and the worker was initially paid hourly but then transitioned to a monthly payment based on typical hours. The written agreement between the parties stated that the worker would provide customer support services at their own discretion on their own schedule on an ongoing, as needed basis.

The firm states that they did not provide instruction or training to the worker. The worker established the software and methods they thought best to use and only provided guidance on business concerns. The worker would set up software to receive requests for customer service and would manage their day to day activities as well as determine the methods by which they were performed. Job assignments were received through instant messaging software. If the worker encountered any problems or concerns, they were required to contact the director of product at the firm. Issues with the business such as refunds were handled by the firm, and issues regarding working tasks were handled by the worker. There were no reports required of the worker. Services such as providing support through emails and answering customer complaints and issues were performed as needed and as available at the worker's office. There were no meetings required of the worker. The firm did not require the worker to personally perform services. The worker could hire helpers or substitutes without the firm's approval and would be responsible for their payment without reimbursement from the firm. The worker states that the firm instructed them on what they could and could not say to customers. Customers would submit tickets to the firm's account. The firm would determine the methods by which job duties were performed and assumed responsibility for problem resolution. Customer support services were provided as needed daily (weekly and also on weekends) for the entire work relationship remotely at the worker's home. The firm required the worker to attend staff meetings and weekly player support meetings with no penalties for not attending. The firm required the worker to personally perform services. The worker could hire helpers or substitutes with the firm's approval.

The firm states that they provided software licenses for tools that were used by multiple contractors and employees. The worker provided their personal computer, devices, and all other software needed. The worker did not lease any space, facilities, or equipment. There were no job-related expenses incurred by the worker. Customers paid the firm. The firm initially paid the worker on an hourly basis, but at the worker's request, this was changed to a monthly sum. The worker could not request advance pay. The firm did not carry worker's compensation insurance on the worker. The worker had no exposure to financial risk or loss in the performance of their job duties. The firm and worker negotiated the worker's hourly rate of pay. The worker states that the firm provided a helpdesk account and subscription and other online tools as needed. The worker provided their personal computer. The worker did not lease anything or incur any job-related expenses. The firm paid the worker a salary with no access to advance pay. The worker did not take a financial risk or suffer a financial loss while working for the firm. The firm set the rate of pay for services performed and the price of products sold.

The firm states that they did not provide benefits to the worker. The relationship between the parties could be terminated by either party without liability or penalty. The worker did not perform similar services for other firms or advertise their services to the public. There were no non-compete agreements in place between the parties. The firm did not represent the worker to customers. Services were performed under the firm's name. The firm ended the work relationship. The worker states that they did not perform similar services for other firms. The firm represented the worker to customers as a contractor performing services under the firm's name. The work relationship ended when the firm terminated the worker.

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.

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, co-adventurer, agent, or independent contractor must be disregarded.

Therefore, a statement that a worker is an independent contractor pursuant to a written or verbal 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. Furthermore, whether there is an employment relationship is a question of fact and not subject to negotiation between the parties.

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. In this case, the services performed by the worker were integral to the firm's business operation as a game developer. The firm provided work assignments by virtue of the customers served and assumed responsibility for problem resolution. These facts evidence the firm retained the right to direct and control the worker to the extent necessary to ensure satisfactory job performance in a manner acceptable to the firm. Based on the worker's education, past work experience, and work ethic the firm may not have needed to frequently exercise its right to direct and control the worker; however, the facts evidence the firm retained the right to do so if needed.

Payment by the hour, day, 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. In this case, the worker did not invest capital or assume business risks. 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. As stated by both parties, the worker had no financial risk and did not incur any job-related expenses. Based on the hourly and then monthly rate of pay arrangement the worker could not realize a profit or incur a loss.

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 the firm's business as a game developer. Both parties retained the right to terminate the work relationship at any time without incurring a liability. 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. In this case, the work relationship was ongoing from 2024 through 2026, involving regular job duties that were not project-based. There is no evidence to suggest the worker performed similar services for others as an independent contractor or advertised business services to the general public during the term of this work relationship. The classification of a worker as an independent contractor should not be based primarily on the fact that a worker's services may be used on a temporary, part-time, or as-needed basis. As noted above, common law factors are considered when examining the worker classification issue.

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.

The firm can obtain additional information related to worker classification online at www.irs.gov; Publication 4341.