

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

Occupation 04OPC 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 non-profit primarily engaged in the business of starting, running and organizing youth flag football leagues, camps, clinics, and tournaments, according to the firm's written agreement with the worker. The worker was engaged as the League Commissioner who was responsible for all aspects of running the league. The worker received a Form 1099-MISC for 2010 through 2016 for his services, as well as received compensation in 2017. There was a written agreement.

The worker received no training; the firm noted that the worker had previously worked in youth sports and was knowledgeable on how to run a youth sports program. The worker noted that he was to perform the work as described by the firm as well as meet all of their directives. The worker's work assignment was to initiate the start-up of running a youth sports league; the worker noted that lists of tasks were emailed with time frames. Each party indicated that the other determined the methods by which the assignments were performed and that the other party was responsible if any issues or problems arose. Only the firm mentioned that the worker submitted financial records to support his league's P&L (profit and loss) which determined his compensation. The worker indicated that all reports, facts, and figures were completed by the firm. There were no set scheduled hours for the worker but his routine included taking phone calls, responding to emails, compiling info that needed to be input from the past game night and prepare for the next games. The worker noted that he worked from his home office and at the game sites. There were no meetings. Only the worker noted that he was required to provide the services personally. The worker noted that he would hire but that the firm would pay; the firm noted that the worker would hire and pay any other helpers.

The worker noted that all equipment and supplies were paid for by the firm. The firm noted that the worker provided these items and that it provided guidelines, the organization, safety and compliance. The firm noted that the worker leased and signed agreements for ballfields, where he determined the league would play. According to the firm, the worker's expenses were all part of his P&L; he was not reimbursed for his expenses. The worker noted that he was paid commission semi-annually. The firm however noted that a percentage split of the league's P&L determined his pay. The customer paid the firm. The worker noted that he had no risk; however, the firm noted that he was 100% financially responsible for his entire league with no limit on the amount of financial loss (no minimum guarantee.) Each party indicated that the other determined the level of payment for services.

Both the worker and the firm agreed that there were no benefits. Either party could terminate the relationship without incurring a liability. The worker did not perform similar services for others though the firm disagreed. The firm noted that the worker was held to a Non-Disclosure of Confidential Information, Professional, and Business practices, Trade Secrets, or privileged information. According to the firm, the worker advertised via school flyers, banners, newspaper advertising and social media; however, the worker noted that the firm paid for all advertising. The firm noted that the worker was 100% responsible for soliciting new customers by any means; the worker indicated that he sent out emails. The firm indicated that worker was responsible for generating leads and determining pricing. The firm determined the league territories with the firm noting that the territories were mutually agreed upon. The worker determined where the league services took place, organized a youth flag football league, and determined all rosters as well as location of play. The worker noted that he was a representative of Friday Night Lights with the firm noting that he was granted use of the trademark and was the only point of contact for the league. The relationship ended when the board breached the contract and terminated the worker's employment; the firm indicated that the worker abandoned the league.

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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. The relationship of the worker and the business must be examined. 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 should be considered. 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.

Section 31.3401(c)-1(c) of the regulations states that generally professionals such as physicians, lawyers, dentists, veterinarians, contractors, subcontractors, public stenographers, auctioneers, and others in an independent business or profession in which they offer their services to the public are not employees. However, if a firm has the right to direct and control a professional, he or she is an employee with respect to the services performed under these circumstances. Often the skill level or location of work of a highly trained professional makes it difficult or impossible for the firm to directly supervise the services so the control over the worker by the firm is more general. Factors such as integration into the firm's organization, the nature of the relationship and the method of pay, and the authority of the firm to require compliance with its policies are the controlling factors. Yet despite this absence of direct control, it cannot be doubted that many professionals are employees.

Factors that illustrate whether there is a right to control how a worker performs a task include training and instructions. 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. The worker obtained the job by filling out an application. The firm indicated that he had previous experience involving youth sports. The worker did not require training, or have set scheduled hours; he was given considerable latitude on the performance of his duties and responsibilities. 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.

The worker was engaged by the firm to provide his services on a full-time basis. The term "full-time" may vary with the intent of the parties and the nature of the occupation since it does not necessarily mean working an eight hour day or a five or six day week. 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.

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. "Profit or loss" implies the use of capital by a person in an independent business of his or her own. The risk that a worker will not receive payment for his or her services, however, is common to both independent contractors and employees and, thus, does not constitute a sufficient economic risk to support treatment as an independent contractor. If a worker loses payment from the firm's customer for poor work, the firm shares the risk of such loss. Control of the firm over the worker would be necessary in order to reduce the risk of financial loss to the firm. The opportunity for higher earnings or of gain or loss from a commission arrangement is not considered profit or loss. The worker's compensation was computed as a percentage of the 'league's P&L.' The worker apparently had purchasing and check signing authority for the league's account; he was responsible for the league's operation. In fact, when his services were terminated, he was told not to write any more checks, to return specific equipment and supplies, as well as to produce a list of unpaid vendors and amounts owed. This would not be an indication of an independent work relationship with the firm.

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. There were no benefits and there was a written agreement. While the semantics of the 'employment' agreement could be argued, there is no worker classification of '1099-employee.' The worker was engaged to start a league, complying with all reasonable instructions, directions, rules, and regulations of the firm whose objective/mission was to start, run, and organize youth flag football leagues, camps, clinics, and tournaments. When doing so, the worker was not engaged in an separate business venture. His services instead were essential to the firm's continuing operations. 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.

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.

Please see Publication 4341 for guidance and instructions for firm compliance.