

SS-8 Determination—Determination for Public Inspection

Occupation 05ITE Instructors/Teachers	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 in the business of providing after school chess instruction to elementary school children, and the opportunity to participate in chess tournaments and championships. The worker was engaged by the firm as a chess instructor. The firm reported the worker's remuneration on Forms 1099-MISC for 2013 through 2017.

Both parties submitted the Independent Contractor Agreement signed on July 26, 2014 stating, among other things that the worker will provide services in accordance with the requirements of the firm; the worker will be assigned a school or schools at which to teach chess for approximately 8 to 16 week semesters, for two consecutive semesters; chess lessons will be conducted in accordance with methods and procedures developed by the firm and provided to the worker; if the worker collects checks and information from the parents of students, it must be delivered to the firm within 24 hours; the worker will contact at least one of the student's primary caregivers twice per semester within the stated time periods and the worker will document this phone call in the firm's system; the worker is required to attend four weekend tournaments per semester, arriving no later than 9:30 and leaving no earlier than 3:30 with an hour for lunch; no tardiness or absenteeism is permitted-if the worker violates this provision sanctions include termination and forfeiting an amount up to \$300; the firm will have the right to immediately terminate the agreement on account of tardiness, absenteeism, poor teaching, or complaints by parents or students; the firm agrees to pay the worker 40% of net revenue per lesson taught and \$2 per child in the worker's base who plays at least one game in a tournament; the worker will be paid a bonus based on the average attendance of the worker's students at designated tournaments during the semester; compensation will be paid every other week based on the number of students taught by the worker; the worker will not compete with the firm, teach any individual, or recruit any of the firm's staff, for a period of 18 months following the termination of the agreement in any school district; and it is the parties' intentions that the worker shall be an independent contractor.

The worker submitted the Coach Job Description stating, among other things that the worker is hired to deliver the firm's system; while every coach is going to have different ideas on what is important to teach, and the system does allow the coach to use some judgment in picking the topics and examples, it is important that the same quality program is delivered in every school it teaches, and therefore, certain responsibilities are a mandatory part of the coaching job, and it is up to the coach to meet these responsibilities in their entirety. All attendance must be filled out completely and accurately, and submitted in a timely manner, to document all material covered. It also has to be signed by a school employee documenting that the worker was at his class on time. To receive timely payment, the worker is to invoice with a summary sheet documenting all coaching activity and store hours onto one piece of paper, including all programs, groups, and chess camps. Private lessons need to be recorded into the student's file in the company student database. The biggest factors in determining how much a coach earns is how many hours they work, how good their classes are, and what demand the quality of their teaching creates. Also, the bigger the student base is, the more income generated. Chess at lunch is voluntary, but simply an opportunity to maximize the income for most of the coach's classes. Coaches are expected to attend tournaments. Coaches receive a bonus of \$2 for every one of their students that attend tournaments for two one-day tournaments and a full 2-day championship. Coaches will be offered 3 hours of training per week for teaching and review to provide the coach with on-going training in coaching and classroom control, as well as to evaluate the coach's performance. Coaches are expected to participate in rated games based upon their current rating.

Information between the parties shows that the firm relied upon the worker's prior training and experience to perform his services. The firm provided the worker with training that was limited to identifying company policies along with school district requirements regarding working with elementary students. The firm provided a listing of contracted schools for the worker to choose from based on his availability; the firm and worker agreed on teaching locations on a semester basis. If problems or complaints occurred, the worker contacted the firm's chess club management for resolution. The worker was required to perform his services personally. If additional personnel were needed, due to the sensitive nature of working with children, the firm was responsible for hiring and compensating them.

The firm provided instructional material which was approved by the district. Neither party indicated an investment by the worker in the firm or a related business. Other than transportation costs, personal chess credentials, and continuing education, the worker did not risk incurring a financial loss. There is no evidence that the worker advertised his services or maintained a business listing. He performed his services under the firm's name. The firm terminated the work relationship.

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, co-adventurer, 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.

Factors that illustrate whether there was a right to control how a worker performed a task include training and instructions. In this case, while the firm relied upon the worker's prior training and experience to perform his services, the worker was expected to follow the firm's policies. According to the job description provided to the worker, the firm offered training, reviews, and evaluations. The firm was responsible for resolving any problems or complaints that may have occurred, showing 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 was required to maintain the firm's student database and submit detailed reports. A requirement that the worker submit regular or written reports to the person or persons for whom the services are performed indicates a degree of control. The worker was required to perform his services personally. 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. The worker was responsible for maintaining his credentials and continuing education. 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. The firm set the rate of compensation and made payment every other week. 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. 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. 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. The worker was not engaged in an independent enterprise, but rather the services performed by the worker as a chess instructor were a necessary and integral part of the firm's business of providing chess instruction and tournament opportunities. 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. The worker was prohibited from performing similar services for others for 18 months after termination. 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. 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. An employer exercises control through the threat of dismissal, which causes the worker to obey the employer's instructions. 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.