

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 worker submitted a request for a determination of worker status in regard to services performed for the firm from January 2018 to December 2018 as a group fitness trainer. The services performed included teaching classes offered by the firm. The firm issued the worker Form 1099-MISC for 2018. The worker filed Form SS-8 as he believes he erroneously received Form 1099-MISC.

The firm's response states it is a fitness studio business offering group classes and private training. The worker was engaged under a verbal agreement to lead group classes and provide personal training. The worker was classified as an independent contractor as he owns his own fitness training business and works at multiple locations performing group and personal training. The worker created his own schedule for training private clients at the firm's studio. He was paid directly by his clients and paid the firm a fixed rental fee for the session. The firm scheduled the worker to teach 60-minute group fitness classes based on his availability, which was typically one class per day, no more than four days a week. The worker was paid a fixed amount per person or a fixed minimum amount per class. The worker received gross pay and never asked about taxes.

The firm stated it asked the worker to show his knowledge of exercises. Work assignments consisted of the worker following a routine given for classes. The firm wrote the routine and the worker taught the class. If problems or complaints arose, the firm was contacted and assumed responsibility for problem resolution. Reports were not required. The worker's routine consisted of teaching one 60-minute class each day he was available to do so. Services were performed at the firm's studio. The worker attended meetings based on his availability. The firm required the worker to personally perform services. The firm was responsible for hiring and paying substitutes or helpers. The worker stated the firm provided him one-week training and try out. The firm determined the methods by which assignments were performed. He performed services on a regular, recurring basis. The firm required he attend staff meetings.

The firm stated it provided group fitness studio equipment. The worker provided anything he chose to bring to his private training sessions. The worker did not lease equipment, space, or a facility. The worker did not incur expenses in the performance of services for the firm. Customers paid the firm. The firm paid the worker per person or a minimum per class. A drawing account for advances was not allowed. The firm did not carry workers' compensation insurance on the worker. The worker was required to carry his own policy. The firm established the level of payment for the services provided. The worker stated he was paid an hourly rate of pay and commission. He did not incur economic loss or financial risk.

The firm stated the work relationship could be terminated by either party without incurring liability or penalty. The worker did perform similar services for others; the firm's approval was not required for him to do so. The worker did not advertise for the firm. The worker personally advertised online. The firm represented the worker as a trainer to its customers. The work relationship ended when the worker stopped providing services for the firm. The worker stated benefits were not provided. He did not perform similar services for others or advertise. Services were performed under the firm's business name. The firm terminated the work relationship.

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, coadventurer, 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.

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. In this case, the firm required the worker to personally perform services. Furthermore, the services performed by the worker were integral to the firm's business operation. The firm provided work assignments, expected the worker to instruct the class routine it wrote, 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.

A person who can realize a profit or suffer a loss as a result of his or her services is generally an independent contractor, while the person who cannot is an employee. "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. 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 acknowledged by the firm, the worker did not incur expenses in connection with services performed. Based on the per person or per class 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. Both parties retained the right to terminate the work relationship at any time without incurring a liability. 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.