

**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 2016 to July 2019 as a tutor. The firm issued the worker Form 1099-MISC for all tax years, and a W-2 and 1099-MISC for tax years 2018 and 2019. The worker filed Form SS-8 as they believe they received Form 1099-MISC in error. The worker provided email exchanges between themselves and the firm, as well as reports and various scheduling emails that were sent from the firm to the worker.

The firm's response states it provides supplemental education services. The work provided by the worker was tutoring. The worker was requested to provide tutoring services to the firm's clients. The firm did not provide supervision or direction. An independent contractor contract between the parties was provided by the firm for our review, in addition to copies of tutoring reports and email exchanges between the parties. The firm reclassified all workers in the same class after the worker no longer performed tutoring services for the firm.

The firm states that they did not provide training or instruction to the worker. The worker was not required to undertake any training or education in order to provide tutoring services to the firm's clients. The firm would provide work assignments to the worker when a family would request a tutor and the firm would contact the worker to see if they wished to accept the assignment. The firm states that the worker determined the methods by which these tutoring assignments were completed, although the firm did provide a suggested curriculum. If the worker encountered problems or complaints, they were required to contact the owner of the firm for problem resolution. The worker was required to submit a tutoring report to the firm upon completion of tutoring sessions using a software provided by the firm. The reports would then be used to create invoices for the firm's clients. The worker determined their own tutoring schedule based around their own schedule and the schedules of the students. The worker performed tutoring services 20% of the time at a local high school and 80% of the time at a location of the worker and family's choosing. The firm states that the worker also had their own office where they provided some tutoring services. The worker was not required to attend any meetings. The worker was not able to have helpers and the worker was required to perform all services personally. The worker states that the firm presented the worker with training and instruction on their job duties. The worker states that the firm owner determined the methods by which job assignments were performed and assumed responsibility for all problem resolution. The firm required weekly notes and penalties existed for late notes. The worker states that there was an end-of-year meeting that was required to attend. The worker was required to provide services personally and could not hire substitutes or helpers.

The firm states that they provided suggested test study guides and Powerpoint presentations, and the worker was required to provide all tutoring supplies and materials as needed. The firm states that the worker leased an office for a separate business they owned and would sometimes use that space for tutoring lessons. The firm states that the worker incurred tutoring supplies expenses as well as transportation expenses. The worker was paid an hourly wage with no access to a drawing account for advances. Customers of the firm paid the firm. The firm carried worker's compensation insurance on the worker. The worker faced the economic loss of damage to their supplies or transportation loss or damages. The firm states that they set the level of payment for all services rendered by their workers. The worker states that the firm provided all supplies, materials and equipment for their job duties and they did not have to provide anything. The worker did not have to lease space, facilities or equipment. The meeting space that they leased was for a different business that the worker operated. The worker only incurred the expense of mileage. The worker states that the firm would buy books directly for their tutors so that they would not have to reimburse their workers for book expenses. The worker was paid an hourly wage. All payments from clients would go directly to the firm. The worker states that their only exposure to financial risk or economic loss would be damage to books they bought themselves.

The firm states that they did not provide the worker with any benefits. The firm states that the firm had a non-solicitation agreement with the worker regarding the firm's clients. The worker did perform similar services for other firms during the work relationship and did not require authorization from the firm to do so. The worker was not a member of a union. The worker was represented by the firm as a contractor under the firm's name. The firm states that the worker advertised their tutoring services on a website that was created shortly before the worker left the firm. The firm states that the worker left the firm and expressed an interest in continuing to work with the firm's clients despite the non-compete provision in the contract between the parties. The worker states that the firm provided the worker with bonuses and referral fees. The relationship between the parties could be terminated by either party without liability or penalty. The worker states that they did not perform similar services for other firms during the work relationship. The worker states that non-compete provisions in the agreement between the parties were only in effect for after the work relationship ended. The worker states that they did not advertise their services to the public. The worker was represented on the firm's website. The worker states that they quit performing services for the firm when they did not receive enough work.

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## 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 by virtue of the customers served, required the worker to report on services performed through tutoring reports, 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. 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. 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. Based on the hourly 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 of tutoring education. Both parties retained the right to terminate the work relationship at any time without incurring a liability. 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, just after it ended. 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](http://www.irs.gov); Publication 4341.