

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

Occupation

05ITE Instructors/Teachers

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 submitted a request for a determination of worker status in regard to services performed for the firm from January 2019 to December 2019 as a teacher. The firm issued the worker Form 1099-MISC for 2019. The worker filed Form SS-8 as they believe they received Form 1099-MISC in error because they were told the curriculum to teach as an employee and were paid an hourly wage. There was no written agreement between the parties. The worker provided monthly synopsis reports they were required to provide to the firm and parents of students.

The firm's response states it is an after-school program that contracts teachers to teach students [REDACTED]. The work provided by the worker was as a replacement teacher. The worker was requested to teach students [REDACTED] classes after school. The firm did not provide supervision or direction. The firm believes the worker was an independent contractor because they came in as an emergency teacher to replace one that left, worked part-time, and performed similar services for other schools. The firm provided copies of earnings statements, pay checks, and curriculum reports.

The firm states that the worker was required to attend monthly teacher meetings led by site coordinators for the firm. The worker started performing services for the firm where the previous teacher had left off. The site coordinator for the firm informed the worker which books were in use and the starting point for the class. The worker designed and used their own curriculum. The worker was required to report to the firm's site coordinator if any problems arose during their work duties. The site coordinator would then report to the firm's owner for problem resolution. The worker was required to submit a monthly curriculum report to the firm. The worker would teach [REDACTED] classes to students for an hour on weekday afternoons after school, often with additional extended class hours. The worker performed services at a designated school site. The firm would pay teachers such as the worker to attend meetings and there were no penalties for not attending. The firm states that the worker did not have to personally perform services, and substitutes and helpers were not applicable. The worker states that the firm's director assigned the worker specific curriculum to teach and assigned the worker a specific group of students. The worker was required to report to the firm's site coordinator for problem resolution should any issues arise. The worker had to provide the firm with weekly teaching plans and a monthly synopsis to parents of the students. The worker performed all of their job duties at the firm's school site. The worker states that they were required to perform all services personally for the firm.

The firm states that they provided the classroom, books, whiteboard, and student materials. The worker would provide their own computer for lesson plans and teaching. Anything that was used by students was later reimbursed by the firm. The worker did not lease space, equipment, or materials for their job duties. The worker only incurred a student materials expense once and was reimbursed for the cost by the firm. The worker was paid on a monthly basis for their teaching hours. They did not have access to a drawing account for advances. Customers of the firm would pay the firm. The firm states that the worker set the level of payment for services rendered. The worker states that the firm provided all of the expenses and materials for the job responsibilities. The worker states that they did not have any expenses related to their job. The worker was paid an hourly wage by the firm. The worker states that the firm did not carry worker's compensation insurance on the worker. The worker did not face any economic loss or financial risk while performing job duties.

The firm states that they paid for monthly teacher meeting attendance and monthly curriculum reports as a benefit to the worker. The relationship between the parties could be terminated without liability or penalty. The firm states that the worker did perform similar services for other firms while working for the firm and did not require approval to do so. There were no non-compete agreements in place. The worker was not a member of a union. The firm represented the worker as a [REDACTED] teacher that was teaching students enrolled at the local school site. The work relationship ended when the worker quit at the end of the year. The worker states that they were not offered any benefits by the firm. The worker states that they did teach at other local schools while working for the firm. The worker did not advertise their services to the public. The worker was represented by the firm as an employee working underneath the firm's name. The work relationship ended when the worker quit their job.

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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 of teaching [REDACTED] to students. The firm provided work assignments by virtue of the students served, required the worker to report on services performed through monthly 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. 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 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](http://www.irs.gov); Publication 4341.