

# SS-8 Determination—Determination for Public Inspection

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| Occupation<br>05ITE Instructor/Teacher | Determination:<br><input checked="" type="checkbox"/> Employee <input type="checkbox"/> Contractor  |
| UILC                                   | Third Party Communication:<br><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 2007 to 2012 as a reading tutor to elementary school students. The firm issued the worker Form 1099-MISC for the years in question. The worker filed Form SS-8 as she believes she was an employee and not an independent contractor.

The firm's response stated its business is tutoring students eligible for services under a federal program. The worker signed an independent contractor agreement to provide a set amount of student tutoring based on the federal program guidelines.

The firm stated it provided the worker specific training and instruction based on the federal, state, and district requirements of the program. The worker was offered tutoring assignments and was free to accept or decline assignments. The worker determined the methods by which assignments were performed within the guidelines of the program. The worker usually resolved most issues or contacted the district manager for guidance. The program required assessment and progress reports on all students in the program. Meetings were not required. The schedule was determined by the worker, family, and school, if tutoring took place at the school. Services could be performed at the student's home, school, or local community center as chosen by the parent. The firm required the worker to personally perform services. The worker stated the firm determined the methods by which assignments were performed as outlined in its training and other various documents, i.e. guidelines to keep in mind when tutoring the firm's students, tutor responsibilities checklist, step-by-step directions, etc. The worker's immediate supervisor was responsible for problem resolution. The firm required the worker to attend an annual, unpaid staff meeting. The firm was responsible for hiring and paying substitutes or helpers.

The firm stated it provided the state approved curriculum. The worker provided whatever supplies were needed to use in her lesson. The worker did not lease equipment, space, or a facility. The worker incurred the unreimbursed expense of a background check, copying, and travel. Tutoring is a government subsidized program. The firm paid the worker an hourly rate of pay; a drawing account for advances was not allowed. The worker did not incur economic loss or financial risk. The worker did not establish the level of payment for the services provided as it was set by the state and local school districts. The worker stated the firm also provided workbooks and online instructional materials.

Benefits were not made available to the worker. The work relationship could be terminated by either party without incurring liability or penalty. There was no agreement prohibiting competition between the parties. The worker was not prohibited from performing similar services for others. The worker did not advertise. The firm represented the worker as a tutor to its customers. Services were performed under the firm's business name. The work relationship ended when the contracted hours were completed. The worker stated she did not perform similar services for others.

The one-on-one tutoring agreement states, in part, if accepting an assignment for tutoring, the worker was expected to provide tutoring services in a timely and professional manner. The firm made no commitment as to the number of students offered. The worker agreed to invoice the firm through the firm's identified online system. Payment would be made in 15 days of receipt of the invoice. The firm would pay the worker only for authorized services performed to the firm's satisfaction. The firm was not liable to the worker for any expenses paid or incurred by the worker, including work-required equipment, tools, materials, and supplies, unless otherwise agreed upon in writing. The firm would not obtain workers' compensation insurance for the worker. The worker was not eligible for any fringe benefits. The worker agreed that students, clients, and referrals from the firm's clients were the sole property of the firm. Recruiting of such was strictly prohibited.

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## Analysis

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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, the firm's statement that the worker was an independent contractor pursuant to a written 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.

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. In this case, the services performed by the worker were integral to the firm's business operation. The firm provided training and instruction which ultimately determined the methods by which assignments were performed. Based on these facts, 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.

Payment by the hour, 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 and as acknowledged by the firm, the worker did not incur economic loss or financial risk.

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 performed similar services for others as an independent contractor or 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.