

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

## Occupation

05ITE.21 Instructor/Teacher

## 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**

It is our usual practice in cases of this type to solicit information from both parties involved. Upon the submission of the Form SS-8 from the worker, we requested information from the firm concerning this work relationship. The firm responded to our request for completion of Form SS-8.

From the information provided the firm is a women's fitness center and the worker was engaged as an American College of Sports Medicine (ACSM) Health Fitness Specialist. Initially the firm treated the worker as contract labor for employment tax purposes reporting the worker's 2013 earnings on Form 1099-MISC. The firm states they changed the worker's status to an employee in 2014 as she had new responsibilities and benefits. The firm reported the worker's 2014 earnings on a Form W-2.

The firm states that while the worker performed services for them, she possessed a college degree and an accreditation with the American College of Sports Medicine (ACSM) as a health fitness specialist. The firm states that training is what enabled the worker to perform her job in a manner according to the methods which the ACSM prescribed and not by them. The firm states the worker was at liberty to work for other related businesses and she could terminate her contract labor status with them without incurring a liability.

During the worker's status as contract laborer, the firm states the worker was free to choose her work schedule based on her other commitments. The firm worked around the worker's varying schedule and they states that for these reasons they were unwilling to offer the worker employment and were unwilling to invest in her as an employee with increased training and compensation. As contract labor, the worker received just enough orientation training to acquaint her with the safe and orderly operation of the firm's club.

The firm states the worker was responsible for all costs associated with maintaining her credentials including continuing education credits and others such as First Aid.

In January 2014, the firm states the circumstances on the worker's part changed so that they could offer her a status change to employee and that her availability was the determining factor. As an employee, the worker given hands-on training in areas she had no expertise, she was given additional responsibility, a pay raise, the firm provided her with staff clothing, and she was eligible for certain training certifications to be paid for by the firm. The firm states the worker was also entitled to employee discounts at certain vendors and she was featured as an employee on their web page

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## Analysis

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As is the case in almost all worker classification cases, some facts point to an employment relationship while other facts indicate independent contractor status. The determination of the worker's status, then, rests on the weight given to the factors, keeping in mind that no one factor rules. The degree of importance of each factor varies depending on the occupation and the circumstances.

Evidence of control generally falls into three categories: behavioral control, financial control, and relationship of the parties, which are collectively referred to as the categories of evidence. In weighing the evidence, careful consideration has been given to the factors outlined below.

Factors that illustrate whether there is a right to control how a worker performs a task include training and instructions. Often the skill level or location of work of a highly trained professional makes it difficult or impossible for the firm to directly supervise the services so the control over the worker by the firm is more general. Factors such as integration into the firm's organization, the nature of the relationship and the method of pay, and the authority of the firm to require compliance with its policies are the controlling factors. Yet despite this absence of direct control, it cannot be doubted that many professionals are employees. In this case, the worker was experienced in this line of work and did not require training or extensive instructions or supervision from the firm. The need to direct and control a worker and her services should not be confused with the right to direct and control. The worker performed her services on behalf of and under the firm's business name rather than an entity of her own. The firm was ultimately responsible for the quality of the work performed by the worker and for the satisfaction of their clients. This gave the firm the right to change the worker's methods and to direct the worker to the extent necessary to protect their financial investment, their business reputation, and their relationship with their clients.

While the firm provided the worker with freedom of action as to when she performed her services, this in and of itself does not determine the worker's status as an independent contractor. The whole relationship needed to be analyzed to determine the worker's correct employment tax status. An important factor of determining a worker's status is who had the contractual relationship with the client and whom did the client pay. In this case, that relationship was between the firm and their clients.

Factors that illustrate whether there is 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.

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.

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. If a worker performs more than de minimis services for a multiple of unrelated persons or firms at the same time, that factor generally indicates that the worker is an independent contractor. However, there was no evidence presented nor found in this investigation that indicates that the worker had an investment in a business related to the services she performed for the firm and offering those services to the public. It should be noted that it is possible for a person to work for a number of people or firms concurrently due to financial need and the supporting oneself and be an employee of one or all of whom engages her. Both parties retained the right to terminate the work relationship at any time without incurring a liability.

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.