

# SS-8 Determination—Determination for Public Inspection

Occupation 05PHC Personal Service Providers	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

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 in the business of offering pet sitting services to clients on vacation, providing dog walking services, and at times, pet taxi services. The worker performed services for the firm from September 2012 to March 2017 and the firm states the worker performed services as an independent contractor performing pet care services as outlined by the client. The firm believes the worker was an independent contractor (IC) because she accepted only the jobs she wanted and she dictated when she would work. There was a written independent contractor agreement between the firm and the worker.

The firm states they provided no training or instructions to the worker in regard to her services. The worker received her assignments from the firm via text messages or email then it was put on the Google calendar. The firm states the clients that hired them determined how the worker performed her services. The worker was required to personally perform her services at the firm's clients' locations. Any problems or complaints that arose were reported to the firm and the firm states they were responsible for the resolution to these issues. The clients dictated the time frame for services to be performed and the firm states the worker made her own schedule based on the clients' needs. The firm states the worker was not required to attend meetings and daily reports were sent directly to the clients. The firm states they were responsible for the hiring and paying of substitutes or helpers.

The firm provided leashes and collars to the worker if needed to perform her services and the worker provided poop bags. The clients provided all other supplies needed to care for their pets. The worker incurred expenses for fuel for her vehicle and parking and the firm reimbursed the worker for the parking expenses. The clients paid the firm for services rendered by the worker and the firm paid the worker on a commission basis. Both parties negotiated an acceptable level of payment for the services provided. The firm reported the worker's earnings on Forms 1099-MISC. The worker did not have an investment in a business related to services performed and therefore, could not incur a loss or realize a profit as a result of her services.

The firm states the worker performed similar services for others and she carried business cards for potential clients that she encountered. The firm states the worker performed services as an independent contractor under their business name. Either party could terminate the work relationship at any time without either party incurring a liability.

The firm states the worker had no responsibility in soliciting new clients and they provided leads to the worker. The firm states the worker determined her own territory.

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## Analysis

As in this case and 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. In this case, the worker was experienced in this line of work and did not require training or detailed instructions 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 provided her services on behalf of and under the firm's business name rather than an entity of her own. The firm was 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 direct and control the worker and her services in order 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 clients and whom did the clients pay. In this case, that relationship was between the firm and their clients. There was no evidence presented or found in this investigation that worker had a business license or business registration in the state which she performed services.

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. "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.

The worker provided poop bags in order to perform her services; however, this is not considered a significant investment. 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.

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.

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, co-adventurer, agent, or independent contractor must be disregarded. Therefore, the firm's statement that the worker was an independent contractor pursuant to an 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.

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. It is possible for a person to work for a number of people or firms concurrently due to financial need and the supporting of oneself and be an employee of one or all of whom engages her.

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.