

SS-8 Determination—Determination for Public Inspection

Occupation 08PRO Team Coach	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 firm is a gymnastics facility. The worker was engaged by the firm as a gymnastics instructor. The firm did not withhold taxes from the worker's remuneration in 2016 through 2018. The firm stated that the worker requested to be treated as an independent contractor.

The agreement between the parties states, among other things, that the worker agrees to perform private, semi-private, or group gymnastic instruction as needed; the firm will pay the worker an hourly rate for group instruction; the worker will be paid within a reasonable time after he submits an invoice with hours worked to the firm, to include the dates covered, a summary of the work performed, and total hours; the worker will pay the firm a fixed gym fee for other lessons; lesson rates are to be set by the worker; the worker is responsible for all vehicle and travel expenses, license and certificate fees, insurance premiums, cell phone expenses, and meals; the worker is responsible for all personnel he hires; the worker is an independent contractor; the worker has the right to perform services for others; the worker has the sole right to control and direct the means, manner, and method by which his services are performed; the services required by this agreement shall be performed by the worker; the worker shall not receive any training from the firm in the professional skills necessary to perform the services required by this agreement; the worker will maintain and comply with any licenses and certificates required to carry out his services; the firm will not withhold FICA taxes, unemployment compensation contributions, or state or federal income taxes; the worker will pay all taxes incurred under this agreement and upon demand, furnish the firm with proof that such payments have been made; the worker understands that he is not eligible for any employee benefits; the firm will not obtain workers' compensation insurance on behalf of the worker; the firm will not provide insurance coverage of any kind for the worker; this agreement may be terminated immediately with reasonable cause or by either party at with 7 days' written notice; and the firm will be entitled to use the worker's name or likeness in advertising and other materials.

Information from the parties supports that the firm relied upon the worker's prior training and experience to perform his services. The worker was responsible for providing his own resolution to problems if they were related to his services. Outside of his service complaints, the worker could direct problems to the front desk. The worker scheduled his own hours to provide instruction, which varied day-to-day. In addition, he had the option to provide instruction for groups/classes needing instructors. All instruction was provided at the firm's location.

The firm provided the setting/the gymnastics facility and incurred its related costs, and the gymnastics equipment. The worker was responsible for his own supplies. The worker incurred expenses for travel, any certifications, USA Gymnastics membership, personal development courses, attendance at camps or clinics to improve coaching, notebooks, and any equipment he chose to use. The worker was paid directly for private lessons. Customers paid the firm directly for group lessons at prices established by the firm. Neither party indicated an investment by the worker in the firm or a related business, or the risk of the worker incurring a financial loss beyond the normal loss of compensation.

The worker provided similar services for others during the same time period. There is no evidence provided showing the worker advertised his services or maintained a business listing.

Analysis

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, your 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. The firm's statement that the worker performed services on an as-needed basis, and was therefore an independent contractor, is without merit as both employees and independent contractors can perform services when the needs of a business warrants, and is not a determining factor in a worker's employment tax status.

Designating a worker's status as an employee or independent contractor is the responsibility of the employer, not the worker. The fact that the worker may have requested to not have employment taxes withheld from his earnings is irrelevant. If an employer-employee relationship exists, the firm is obligated by law to withhold the appropriate employment taxes.

Factors that illustrate whether there was a right to control how a worker performed a task include training and instructions. In this case, while the firm relied upon the worker's prior training and experience, it was ultimately responsible for resolving any problems or complaints that may have occurred, showing the firm retained the right to change the worker's methods and to direct the worker to the extent necessary to protect its financial investment. The worker was required to submit weekly time sheets. A requirement that the worker submit regular or written reports to the person or persons for whom the services are performed indicates a degree of control. The worker performed his services on the firm's premises. He was required to perform his services personally, meaning he could not engage and pay others to perform services for the firm on his behalf. 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. These facts show that the firm retained behavioral control over the services of the worker.

Factors that illustrate whether there was 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 pay a set daily, weekly, or monthly amount for using the facility, 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 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. There is no evidence to suggest the worker's vehicle and phone were purchased exclusively for business purposes. Presumably these items were also used by the worker for his personal needs, and therefore, they are not considered a significant business investment. The firm paid the worker at an hourly rate for group lessons. Payment by the hour generally points to an employer-employee relationship. The worker paid the firm a nominal fee for each private lesson he instructed. Any lessons made by the worker benefited the firm's business, and the firm also incurred a loss for any lack of business. These facts show that the firm retained control over the financial aspects of the worker's services.

Factors that illustrate how the parties perceived 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 were 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 as a gymnastics instructor were a necessary and integral part of the firm's business of providing gymnastics instruction. 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. The firm did not prohibit the worker from performing similar services for others; however, it is possible for a person to work for a number of people or firms concurrently and be an employee of one or all of them. These facts show that the firm retained control over the work relationship and services of the worker.

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.