

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

Occupation

08PRO Professional Athletes

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 payer as a timeclock operator and scorekeeper during hockey games. The payer issued the worker Form 1099-MISC for 2017 and 2018. The worker filed Form SS-8 to determine his worker status for purposes of Federal employment tax and income tax withholding.

The payer's response states it is a non-profit organization formed to promote the growth and development of high-quality high school hockey. The league coordinates ice scheduling for the high school teams. The worker is engaged as a clock operator. He runs the game clock for high school hockey games. The payer (league) does not dictate the worker's schedule. He is offered first right of refusal as to the games he operates. If he is not available, the payer will seek someone else, even a parent volunteer. The worker is paid a nominal amount per game for the simple convenience of avoiding the hassle of seeking a volunteer. There is no written agreement between the parties.

The payer stated it does not provide specific training or instruction to the worker. The worker is provided the game schedule and determines which games he will work. The worker has first right of refusal. The league commissioner is contacted and assumes responsibility for problem or complaint resolution. The payer requires the worker to provide the completed scorecard at the end of the game. The worker has no daily routine. His schedule is based on the games he elects to work. Services are performed at a rented ice arena. The worker is not required to attend meetings. The payer requires the worker to personally perform services. The league commission is responsible for hiring substitutes or helpers. The payer is responsible for paying them. The worker stated the payer provides him specific training and/or instruction related to how to run a timeclock and keep score. Work assignments are verbally provided or based on the hockey schedule. The league's commissioner determines the methods by which assignments are performed and assumes responsibility for problem resolution. His routine consists of running a timeclock for three hours, two times per week, for 3 – 4 months.

The payer stated it provides the scoresheet. The arena provides the game clock. The worker does not lease equipment, space, or a facility. The worker does not incur expenses in the performance of services for the payer. The payer pays the worker a set amount per game, regardless to the length of the game. A drawing account for advances is not allowed. The payer does not carry workers' compensation insurance on the worker. The worker does not incur economic loss or financial risk. The worker does not establish the level of payment for the services provided. The worker stated the payer pays him an hourly rate of pay.

Benefits are not provided. The work relationship can be terminated by either party without incurring liability or penalty. The payer stated it is unknown if the worker performs similar services for others or advertises. There is no agreement prohibiting competition between the parties. The payer is not currently in season; future work is dependent on the worker. The worker stated he does not perform similar services for others or advertise.

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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 payer requires the worker to personally perform services. Furthermore, the services performed by the worker are integral to the payer's organizational operations. The payer provides work assignments by virtue of the scheduled hockey games, requires the worker to report on game results as documented on the scorecard, and its league commissioner assumes responsibility for problem resolution. These facts evidence the payer retains the right to direct and control the worker to the extent necessary to ensure satisfactory job performance in a manner acceptable to the payer. Based on the worker's education, past work experience, and work ethic the payer may not need to frequently exercise its right to direct and control the worker; however, the facts evidence the payer retains the right to do so if needed.

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 payer's customer for poor work, the payer shares the risk of such loss. Control of the payer over the worker would be necessary in order to reduce the risk of financial loss to the payer. The opportunity for higher earnings or of gain or loss from a commission arrangement is not considered profit or loss. In this case, the worker has not invested capital or assumed 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. As acknowledged by the payer, the worker does not incur economic loss or financial risk. Based on the per game rate of pay arrangement the worker cannot 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 is not engaged in an independent enterprise, but rather the services performed by the worker are a necessary and integral part of the payer's operations. Both parties retain the right to terminate the work relationship at any time without incurring a liability. There is no evidence to suggest the worker performs similar services for others as an independent contractor or advertises business services to the general public. 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 payer has the right to exercise direction and control over the worker to the degree necessary to establish that the worker is a common law employee, and not an independent contractor operating a trade or business.

The payer can obtain additional information related to worker classification online at [www.irs.gov](http://www.irs.gov); Publication 4341.