

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

Occupation 02CSP Computer Services Personnel	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 worker submitted a request for a determination of worker status in regard to services performed for the firm from November 2012 to November 2017 as an application support worker. The services performed included daytime and 24/7 on-call production support for the firm's laboratory applications and servers. The worker was originally employed by the firm from August 2006 until October 2012, performing the same services. After a three-week break in service, he was retained as an independent contractor to perform the same services. The firm issued the worker Form W-2 and Form 1099-MISC for 2012; Form 1099-MISC for 2013 through 2017. The worker filed Form SS-8 as he believes he erroneously received Form 1099-MISC.

The firm's response states it is a production laboratory facility servicing insurance, drug testing, clinical trials, and wellness. The worker received a Form W-2 for employment which ended in October 2012. While employed, from August 2006 through October 2012, the worker was a member of an enterprise team. Work was assigned by his manager on specifics and deadlines; work was required to be performed on the firm's premises. The worker received a Form 1099-MISC after commencing contract work in November 2012. Work as a consultant was in support of a business line, performed off the firm's premises, and the worker's work hours were not defined. When the worker was engaged as a consultant, the services performed included project and production support. Services were performed under a master agreement for consulting services. The worker signed the agreement as an independent contractor; the agreement ran for a one-year term with automatic renewal for successive one-year periods; either party could terminate the agreement at any time.

The firm stated it did not provide specific training or instruction to the worker. Access to the firm's ticket system provided work assignments for the worker. The worker chose tasks he could perform. Some assignments were emailed to the worker. Using the firm's corporate guidelines, the worker determined the methods by which assignments were performed. The firm's management was contacted and assumed responsibility for problem resolution. Reports included the worker's invoices which documented the date range and hours worked. The worker's schedule varied based on his discretion. Services were performed at the worker's home. Occasional conference calls were scheduled; the worker was not penalized if unable to attend. The firm required the worker to personally perform services. Substitute helpers were not warranted in the agreement. The worker stated the firm provided him specific training and/or instruction via weekly cross-training meetings, internal documents on custom systems, daily email/phone interaction on assignments/issues, and on-call priorities received via the firm's on-call cell phone. This knowledge was required in order to perform services. The firm determined the methods by which assignments were performed. All work ticketing and time tracking were done on the firm's internal systems. His routine consisted of Monday through Friday, 9 am to 5 pm. He would log into the firm's network and work on ticket assignments alongside the team. Every other week (or more) on-call rotation entailed 24/7 responsiveness to phone alerts and calls for 40+ hours monthly. The firm required he attend various meetings.

The firm stated it did not provide supplies, equipment, or materials. The worker provided all equipment required to perform services. It is unknown if the worker leased equipment, space, or a facility. It is unknown if the worker incurred expenses. The firm did not reimburse the worker for any expenses he may have incurred. Customers paid the firm. The firm paid the worker an hourly rate of pay; a drawing account for advances was not allowed. The firm did not carry workers' compensation insurance on the worker. It is unknown if the worker incurred economic loss or financial risk. The rate of pay was negotiated and agreed upon by the firm and worker. The worker stated the firm provided a 24/7 on-call cell phone; a computer on-site at the firm's location to connect and execute all work software; test, stage, and production servers. He provided a cell phone for daytime use and a computer to execute connection to the firm's computer. He did not lease equipment, space, or a facility. The firm established the level of payment for the services provided.

The firm stated the work relationship could be terminated by either party without incurring liability or penalty. It is unknown if the worker performed similar services for others or advertised. There was no agreement prohibiting competition between the parties. The firm represented the worker as a consultant to its customers. Work performed was the firm's property. The work relationship ended when the contract ended. The worker stated the benefit of personal days was made available to him. He did not perform similar services for others. The firm represented him as an employee to its customers. Services were performed under the firm's business name. The firm ended the work relationship with a 30-day notice.

The master agreement for consulting services, dated 11/2/12, states, in part, the worker agreed to use his best effort to supply consulting services to the firm in the performance of project planning, project design, analysis of data, and professional documentation of the firm's research in a form and manner ready for publication as specified by a work order. All work product created by the worker would be the firm's sole property.

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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, 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. 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 firm required the worker to personally perform services. Furthermore, the services performed by the worker were integral to the firm's business operation. The firm provided work assignments, required the worker to perform services in accordance with its established policies and procedures, and assumed responsibility for problem resolution. These facts evidence 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. Based on the worker's education, past work experience, and work ethic the firm may not have needed to frequently exercise its right to direct and control the worker; however, the facts evidence the firm retained the right to do so if needed.

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. As the worker likely used his personal computer, Internet service, and cell phone for personal needs, these items are not considered a significant investment. Based on the hourly rate of pay arrangement the worker could not 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 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.

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