

# SS-8 Determination—Determination for Public Inspection

Occupation 02CON Consultants	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 August 2018 to February 2019 as a consultant. The services performed by the worker included cell research. The firm issued the worker Form 1099-MISC for 2018. A copy of the 2019 tax reporting document was not provided for our review. The worker filed Form SS-8 to determine his responsibility for the payment of federal taxes.

The firm's response states it is a small, start-up biotech company. In July 2019 it had no employees, only managers. In 2018, it was trying to establish a partnership with another company. The firm's contribution was to provide technical expertise for the design and operation of the facility. The worker was hired as a consultant to assist the firm in developing those plans. Upon financing and formation of the new partnership, the worker was to be hired as the senior scientist. Unfortunately, the firm and the other company could not raise the funds needed to complete the facility and the pending partnership was dissolved. As the worker's services were no longer required, his consulting relationship was also terminated. There was no written agreement between the parties.

The firm stated it did not provide the worker specific training or instruction. The worker was to develop the facility for production based on his expertise. A group meeting with other vested individuals to discuss and plan the new company provided work assignments for the worker. The group discussion and the worker determined the methods by which assignments were performed. The firm was contacted and assumed responsibility for problem resolution. Reports included the worker developing a standard operating procedure for virus production and design of the production facility. The worker worked independently. Services were performed at a laboratory rented by the firm which was to be for the new company. The firm required the worker to attend weekly meetings. The worker stated the firm and others determined the methods by which assignments were performed. His daily routine consisted of 8:30 am to 5:30 pm; 8-hours per day.

The firm stated it provided basic molecular biology supplies and equipment for establishing the facility. The worker did not lease equipment, space, or a facility. The worker did not incur expenses in the performance of services for the firm. The firm paid the worker bi-weekly; a drawing account for advances was not allowed. The firm did not carry workers' compensation insurance on the worker. The worker incurring economic loss or financial risk was not applicable. The worker did not establish the level of payment for the services provided. The worker stated the firm paid him an hourly rate of pay. The firm established the level of payment for the services provided.

The firm stated benefits were not made available to the worker. The work relationship could be terminated by either party without 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 worker could work remotely. The firm represented the worker as a senior scientist to work for the new company. The work relationship ended when negotiations with the other company were terminated and the the worker's involvement was no longer required. The worker stated he did not perform similar services for others or advertise. The firm represented him as an employee and potential future partner to its customers.

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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.

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. In this case, the services performed by the worker were integral to the firm's business operation and proposed future business development. The firm provided work assignments, ultimately determined the methods by which assignments were performed, required the worker to report on services performed, 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 acknowledged by the firm, the worker did not incur economic loss or financial risk. Based on the bi-weekly or 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 on-line at [www.irs.gov](http://www.irs.gov); Publication 4341.