

SS-8 Determination—Determination for Public Inspection

Occupation 02AAD Architects, Artists, and Designers	Determination: <input checked="" type="checkbox"/> Employee <input type="checkbox"/> Contractor
UILC	Third Party Communication: <input checked="" type="checkbox"/> None <input type="checkbox"/> Yes

Facts of Case

The firm is in the business of providing online sales of construction products. The worker was engaged as a consultant for photo imaging. She received a Form 1099-MISC for her services in 2016 and 2017. There was no written agreement.

The worker noted that she received basic instructions from the firm with the firm providing the work assignments as needed. The worker was responsible for solicitation of customers by following the leads obtained through the owner. she sold the products (cabinets, doors, windows, etc.) in the office and online through the company website as well as performed drafting and design for the firm. Each indicated that the other party determined the methods by which the assignments were performed. Both parties agreed that the firm would be contacted if any issues or problems arose though the firm noted that the worker would responsible for any resolutions. The firm noted that the worker submitted weekly time reports. According to the worker, her work routine consisted of daily hours, first part-time then full-time at the firm's location, dealing with people that walked-in as well as online inquiries. She also performed drafting and design for the owner/architect. The firm noted that she worked various times according to her own schedule. Both parties agreed that all services were performed at the firm's premises. There were no meetings. Both parties agreed that the worker was to provide the services personally; the worker added that only the firm could hire and pay any substitutes.

The firm provided office materials with the worker adding that the firm also provided the computer, software, printer and internet. The worker did use her phone for photos, etc. Both agreed that the worker was paid an hourly rate and had no other economic risk. The customer paid the firm. The firm carried workers' compensation insurance on the worker. Both parties agreed that the worker did not establish the level of payment for services. Only the worker noted that she received a one week paid vacation after one year. The firm indicated that either party could terminate the relationship without incurring a liability. The worker did not provide similar services for others. The work relationship has ended.

Analysis

In determining whether an individual is an employee or an independent contractor under the common law, all evidence of both control and lack of control or independence must be considered. The relationship of the worker and the business must be examined. Facts that show a right to direct or control how the worker performs the specific tasks for which he or she is hired, who controls the financial aspects of the worker's activities, and how the parties perceive their relationship should be considered. As is the case 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.

Factors that illustrate whether there is a right to control how a worker performs a task include training and instructions. In this case, 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 hired by the firm for her specific skills and experience. While the worker may not have received any training or extensive instructions, she was assigned work by the firm at its location. If the work is performed on the premises of the person or persons for whom the services are performed, that factor suggests control over the worker, especially if the work could be done elsewhere. The worker initially was hired for a part-time position at the firm's location, however, her hours were increased. The term "full-time" may vary with the intent of the parties and the nature of the occupation since it does not necessarily mean working an eight hour day or a five or six day week. If the worker must devote substantially full-time to the business of the person or persons for whom the services are performed, such person or persons have control over the amount of time the worker spends working and, therefore, the worker is restricted from doing other gainful work. An independent contractor, on the other hand, is free to work when and for whom he or she chooses. It was reasonable that the firm expected the worker to provide the services she was hired for as the firm had her fill out an application, provide a resume and a portfolio. 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 addition, the worker provided her services on a continuous basis throughout the time period involved. A continuing relationship between the worker and the person or persons for whom the services are performed indicates that an employer-employee relationship exists. A continuing relationship may exist where work is performed in frequently recurring although irregular intervals.

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. The firm provided the workplace, the workspace, and office supplies needed by the worker to provide her services. The worker received an hourly rate of pay and had no other economic risk. 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.

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. There was no written agreement. The worker was engaged by the firm as a designer/salesperson with photo imaging skills. When doing so, the worker was not engaged in an separate business venture. Her services instead were integral and part of the firm's continuing operations. 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 indicated that the worker was informed that she would be receiving a Form 1099-MISC. However, in *Bartels v. Birmingham*, 332 U.S. 126, 1947-2 C. B.174, the Supreme Court stated that whether there is an employment relationship is a question of fact and not subject to negotiation between the parties. A worker, even if agreeing to the receipt of a Form 1099, would not be self-employed when the facts support an employer/employee relationship.

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. Please see Publication 4341 for guidance and instructions for firm compliance.