

SS-8 Determination—Determination for Public Inspection

Occupation 02ABT Bookkeeper/Accountant	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 in the business of manufacturing home ventilation products. The worker was engaged to provide accounting services. She received a 2017 Form 1099-MISC as well as a 2017 Form W2 for her services. She received Form W2 in each year from 2013 through 2016. There was a written agreement.

Both the firm and the worker agreed that the worker did not need any training or instructions as she worked in a similar capacity in previous years. The worker continued with her current responsibilities, with the worker noting that the controller provided her with her work assignments. Both parties agreed that the worker determined the methods by which the assignments were performed although the worker included that the controller did as well. Both also agreed that the controller would be contacted if any issues or problems arose. The firm indicated that the worker submitted invoices; the worker noted that she could not provide examples of any confidential reports that she was required to submit. The worker noted that she generally had a daily work schedule at the firm's location. The firm noted that it did not know her schedule or where she worked. There were no meetings. Both parties agreed that the worker was to provide her services personally.

According to the worker, the firm provided the laptop, and all supplies needed; however, the firm noted nothing was provided. The worker was paid an hourly rate; the firm noted that the worker was paid daily and invoiced the firm weekly. The worker had no other economic risk. The firm noted that the worker established the level of payment for services though it appeared that they initiated the agreement.

Both the firm and the worker agreed that there were no benefits and that either party could terminate the relationship without incurring a liability. The worker did not perform similar services for others. The firm noted that she provided services under own business name. The 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. 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. In addition, there was no substantial change to the services that the worker provided. She continued to provide general accounting services to the firm at its location. It was the firm that indicated she performed her services in the same capacity as when she was an employee. She may not have worked regular set scheduled hours as evidenced on the invoices. Usually, the establishment of set hours of work by the person or persons for whom the services are performed is a factor indicating control; however, if the nature of the occupation makes fixed hours impractical, a requirement that workers be on the job at certain times is an element of control. The invoices also provided evidence of an essentially full-time work relationship based on the hours worked. 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. But, 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.

While the firm had indicated that it did not know where she worked, the worker and the service agreement noted that her consulting services were to be performed at the firm's premises. All of these elements and facts existed when the worker was a full-time employee and continued to exist throughout the entire work relationship.

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. It was the firm that provided the workplace, workspace, laptop, furnishings and supplies in order for the worker to provide her services. She was paid an hourly rate and had no other economic risk as she had no investment on which to incur a profit or loss. 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 were no benefits and there a written agreement. However, the firm's belief 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 indicated that both parties agreed to the independent contractor relationship by entering into an independent contractor agreement. 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. So, the parties cannot simply agree to a relationship that is not supported by the facts.

The worker continued to provide her accounting services solely for the firm. There was no evidence indicating that she was operating a separate business venture when working for the firm. In this case, there was no change in services and circumstances to warrant the change in the treatment of the worker for federal employment tax purposes.

Based on the above analysis, we conclude that the firm had the right to exercise direction and control over the worker for the entire work relationship 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.