

SS-8 Determination—Determination for Public Inspection

Occupation 02ABT Staff 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 worker submitted a request for a determination of worker status in regard to services performed for the firm from June 2018 to November 2018 as a staff accountant. The services performed included researching property using the firm's account, pulling and filling out reports, and helping assist in obtaining new clients from lists provided by the firm. The firm issued the worker Form 1099-MISC for 2018. He filed Form SS-8 as he believes he should have received Form W-2.

The firm's response, states it is a real estate appraisal business. The worker was engaged as an associate. The worker performed appraisal and accounting services. The firm believes the worker was an independent contractor as he set his own work schedule, did not receive benefits, and was free to work other jobs. The worker agreed he was an independent contractor in the beginning and would be billed a fee for his services based upon an hourly rate.

The firm stated it provided very little training as the worker's knowledge and experience quickly transferred to the appraisal work being done. Work assignments were distributed as it came into the firm. The worker determined the methods by which assignments were performed. If problems or complaints arose, the firm relied on the worker to handle the situation. Completion of data entry and bookkeeping reports were required. The worker set his own hours. The firm's office was open from 9:00am until 8:00pm. The worker was allowed to go in at any time to perform services agreed upon. Services were performed at the firm's premises. There were no meetings required. The firm required the worker to personally perform services. The worker stated the firm instructed him on how to do tasks, set-up appraisals, file, and taught him on what reports and research to pull. The firm provided work assignments on a day to day basis. The firm determined the methods by which assignments were performed. The firm was responsible for problem resolution. He performed services from 9:00am until 5:00pm. The firm was responsible for hiring and paying substitutes or helpers.

The firm stated it provided a computer as relative data and information were on it. The worker did not lease equipment, space, or a facility. The firm paid the worker on the services billed by the hour; a drawing account for advances was not allowed. The firm did not carry workers' compensation insurance on the worker. Incurring economic loss or financial risk was not applicable for the worker. The firm established the level of payment for the services provided. The worker stated he did not incur expenses. The firm paid for computer, software, and tax database software. He did not have any work-related expenses. Customers paid the firm. He did not incur economic loss or financial risk.

The firm stated the work relationship could be terminated without penalty. Performing similar services for others was determined by the worker. Word of mouth was the type of advertising done by the worker. Representing the worker to its customers was not applicable. The work relationship ended when the worker terminated the relationship. The worker stated there were no benefits made available to the worker. Services were performed under the firm's business name.

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 is an independent contractor pursuant to a 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 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 required the worker to report on services performed. 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.

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 firm's customer for poor work, the firm shares the risk of such loss. Control of the firm over the worker would be necessary in order to reduce the risk of financial loss to the firm. 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 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. Based on the billed by the hour 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; Publication 4341.