

SS-8 Determination—Determination for Public Inspection

Occupation 02BTR Director/Financial Planner	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 a registered investment advisor business to individuals and businesses. The firm engaged the worker to perform office management and retirement advisory services for the firm's business operation. The worker was experienced so no formal training was provided by the firm. The firm did provide the worker with business practice and procedures guidance. The firm allowed the worker to work on a flexible variable schedule based on the firm's and firm's customers business needs. The firm and worker determined the methods used to perform the services. The worker was contacted regarding problems or complaints for resolution with regard to the office management services performed. The worker was required to provide the firm with a list of legacy clients brought with her and business reports with regard to sales made, services performed, and costs related to the operation of the office. The firm required the worker to perform the services personally. The worker performed the services at the firm's office, from home, and at customers locations.

The firm provided the office, office equipment, materials, and supplies. The worker provided the credentials needed to perform the services. The worker did not lease anything. The worker did not incur any significant on-going business expenses. The business expenses were taken out of the gross revenue brought into the business prior to the workers' commission payments being computed. The firm paid the workers a salary per month as well as commissions based on levels of business profits after business deductions were taken. The customers paid the firm for the services and products sold. The firm did carry workers' compensation insurance. The firm determined the level of payment for the products and services used in the business operation and paid to the worker. The worker could not suffer any economic loss due to significant business capital outlays being made. The worker did not have control over profits and losses with regard to the services performed for the firm's business operation.

There were signed agreements between the firm and worker. The agreements addressed the autonomy of the working relationships, the worker's classification of independent contractor, duties, terms, and compensation in attachments. The agreements addressed confidentiality, ownership, conflicts of interest, and other working relationship issues. The worker received paid benefits from the firm as an employee but none as an independent contractor per the firm. The workers did not perform similar services for others while performing services for the firm. The worker advertised her services under the firm's business name as a managing director on business cards. The firm indicated that the worker could suffer an economic loss and had financial risks with regard to her reputation, fiduciary liabilities, and loss of revenues related to customer retentions and recruitments.

The firm paid the worker as an employee for the office management services a set amount per month and as an independent contractor for commissions on sales brought into the office being managed after the expenses were deducted. A Form W-2 and Form 1099-MISC was issued each year to the worker.

Analysis

When a firm determines or retains the right to determine directly or through designation what, how, when, and where workers perform services an employer/employee relationship exists. For federal employment tax purposes, it is not necessary for firms to exert direct or continuous control nor that services be performed full-time on a fixed scheduled basis, it is sufficient that the firm retains the right to change the workers services, as they deem necessary for business purposes. The issues that the worker performed services on a flexible schedule basis and at various locations other than the firm's office would not make the worker to be an independent contractor. The worker performed the services based on the firm's business needs and firm's customers requests. Control may come from verbal instructions, training, meetings, reporting, as well as supervision. The signed contract and attachments determined what, how, when, and where the worker would perform services deemed by the firm's business needed to be performed by the worker in order to grow the firm's business reputation and end results. Also, the methods used by workers to perform services are not only controlled through verbal instructions but also by equipment, materials, and supplies provided. In this case, the firm not the worker had control over the methods and means used in the performance of the services. These facts evidence behavioral control by the firm over the services performed by the worker.

When a worker does not have a significant financial investment in a business requiring on-going business capital outlays with business risk an employer/employee relationship is evident. In this case, the worker had no financial investment in a business and did not incur any business expenses. The firm had the business investments and control over profit and risk of loss with regard to the services the worker performed for the firm's business. The firm paid the worker a set amount per month for the office management services and commission on net revenues the office brought in after all expenses were deducted. The customers paid the firm. The firm determined the level of payment for products used in the business and payment for services paid by the customers and paid to the worker. The opportunity for higher earnings or of gain or loss from a commission arrangement is not considered profit or loss. The worker could not suffer any economic loss and had no financial risk with regard to the services performed for the firm's business operation.

There were signed agreements entered into indicating the worker to be an independent contractor. The agreements addressed the autonomy of the working relationship, expectations, payment for services etc. It is noted that whether there is an employment relationship is a question of fact based on the autonomy of the work relationship and is not subject to negotiation between the parties written or verbal. The worker performed services for your business under your business name over several years. The worker did not perform similar services for others while performing services for your business. The worker advertised your business to the public with business cards.

Both the firm and the worker retained the right to terminate the working relationship at any time without incurring any liability for termination. The right to discharge a worker at any time without incurring a liability for termination is a factor indicating that the worker is an employee and the person possessing the right is an employer. An employer exercises control through the threat of dismissal, which causes the worker to obey the employer's instructions. An independent contractor, on the other hand, cannot be fired without a liability so long as the independent contractor produces a result that meets the contract specifications. Likewise, if the worker has the right to end his or her relationship with the person for whom the services are performed at any time he or she wishes without incurring liability, that factor indicates an employer-employee relationship.

We have determined that the worker was an employee under common law for all services performed for the firm.