

SS-8 Determination—Determination for Public Inspection

Occupation 02COO Coordinators	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 an Event Planner specializing in conducting events; the firm rents a banquet hall and engages workers to manage the events. As the owner of the firm, you engaged the worker as an Event Manager/Host/Bartender. You reported the worker's remuneration under your SSN and your spouse's SSN for 2013 through 2017. There is no evidence that you are withholding taxes from the worker's remuneration in 2018.

You submitted the "Employee form for 1099" stating that the worker is a self contractor and is paid in full for jobs performed; he is responsible for his own taxes and insurance; he is on an as needed basis; the worker is physically able to perform the task contracted out for; and the worker holds the firm and its officers harmless of any injury that may occur under normal working conditions.

Information from the parties supports that you rely upon the worker's prior training and experience to perform his services. You offer the worker jobs and he is free to accept or reject the offer. If problems or complaints occur, the worker is responsible for their resolution. The worker provides you with feedback after an event. The worker's schedule is variable, and is dependent upon your firm's event schedule. He provides his services at locations that you designate. The worker is required to perform his services personally.

The worker is responsible for maintaining his state server permit. He provides his own drink mixers, clothing, cups, license, telephone, insurance, etc. The worker does not lease equipment, space, or a facility. You pay the worker dependent upon the nature of events and the hours it takes to perform the job. You do not cover the worker under workers' compensation. Customers pay your firm directly at prices that you establish. Neither party indicated an investment by the worker in your firm or a related business. Other than liability for any damage he may cause, the worker does not risk an economic loss.

Your firm does not make benefits available to the worker. Both parties reserve the right to terminate the work relationship without incurring a penalty or liability. You do not prohibit the worker from performing similar services for others. There is no evidence presented showing the worker advertises his services or maintains a business listing.

Analysis

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, your statement that the worker is 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. If a firm has to make a worker “understand” or even if a worker “agreed to” being an independent contractor (as in a verbal or written agreement), this factor does not determine the worker’s status as an independent contractor. An individual knows they are in business for themselves offering their services to the public and does not need to be made aware of, understand, or agree to be an independent contractor.

Factors that illustrate whether there is a right to control how a worker performs a task include training and instructions. In this case, you retain the right to change the worker’s methods and to direct the worker to the extent necessary to protect your financial investment and ensure your customers’ satisfaction with the work. While you rely upon the worker’s prior training and experience to perform his services, you must be ultimately responsible for any problems or complaints that may occur. Your statement that the worker performs services on an as-needed basis, and is therefore, an independent contractor, is without merit as both employees and independent contractors can perform services when the needs of a business warrants. The worker performs his services at locations that you designate. Control over the place of work is indicated when the person or persons for whom the services are performed have the right to compel the worker to travel a designated route, to canvass a territory within a certain time, or to work at specific places as required. 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. These facts show that you retain behavioral control over the services of the worker.

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, does not have the opportunity to realize a profit or incur a loss as a result of the services provided. “Profit or loss” implies the use of capital by a person in an independent business of his or her own. The worker utilizes his mixer equipment, cups, clothing, telephone, etc., and maintains his own license and insurance. 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. You pay the worker on a piece work basis, and the risk of loss is absent. These facts show that you retain control over the financial aspects of the worker’s services.

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 performs his services on a continuing basis. 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. The worker is not engaged in an independent enterprise, but rather the services performed by the worker as an event manager, host, and bartender are a necessary and integral part of the firm’s event planning business. 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 worker may perform similar services for others; however, it is possible for a person to work for a number of people or firms concurrently and be an employee of one or all of them. These facts show that the firm retains control over the work relationship and services of the worker.

Based on the above analysis, we conclude that you have the right to exercise direction and control over the worker to the degree necessary to establish that the worker is a common law employee, and not an independent contractor operating a trade or business.