

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 in the business of providing services as a booking agency. The worker was engaged as a booking agent. She received Form 1099-MISC for her services in 2014, 2015, and 2016; she also provided services in 2013 as well. There was a written non-compete agreement.

According to the worker, the firm provided instructions to the worker regarding the preferences of venues the firm booked as well as various tasks to perform on a daily and weekly basis. The worker was responsible for getting new musicians and new venues-all of which belonged to the firm. The worker offered dates to the firm's roster of artists and offered entertainment options to venues that the firm was working with. Both parties agreed that the firm gave the worker her work assignments via facebook, email or text. The firm determined the methods by which the assignments were performed and both agreed that the firm would be contacted if any issues or problems arose. The worker submitted reports, copying the firm on calendar lists to media, tagging the firm in photos of shows that worker attended, and preparing event lists required to post daily on the worker's personal facebook. The worker noted her work routine varied based on the firm's needs as well as the worker's retail job. She attended venues and worked at her home. The firm noted that the worker made her own hours, working from her computer and home. There were meetings; the firm disagreed. Both parties agreed that the worker was to perform her services personally; only the firm would hire and pay any substitute workers.

The worker noted that the firm provided business cards, access to firm group on facebook, firm contacts and necessary passwords to firm accounts. Both parties agreed that the worker provided her own computer and phone; she incurred fuel expenses for which she was not reimbursed. The worker noted that she was paid a salary; the firm agreed the worker was paid a set weekly amount. Both parties agreed that the customer paid the firm. Both agreed that the worker did not establish the level of payment for services.

Only the worker mentioned that there were paid vacations. While she was working or if she quit or was fired, non-compete terms applied and would not allow her to perform similar services within a specified area. The firm also mentioned the existence of the non-compete agreement and that there was no liability or penalty if the relationship was terminated, The worker did not perform similar services for others; the firm did not know. The worker noted that she was referred to as an agent with musicians, as a representative to the venues, and to others, as simply working for the firm. Both agreed that the relationship ended when the worker quit.

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 firm engaged the worker to assist in its operations. The firm provided instructions, even if just initially. A control factor is present if the person or persons for whom the services are performed have the right to require compliance with instructions. Although the worker was given considerable latitude regarding her work schedule and routine, she reported her various activities to the firm. A requirement that the worker submit regular or written reports to the person or persons for whom the services are performed indicates a degree of control. This was understandable as the worker was representing the firm's business. It is acknowledged that the worker did not work at the firm's location. Work done off the premises of the person or persons receiving the services, such as at the office of the worker, indicates some freedom from control. However, this fact by itself does not mean that the worker is not an employee. The importance of this factor depends on the nature of the service involved and the extent to which an employer generally would require that employees perform such services on the employer's premises. In addition, the worker's services were continuous for 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. While the worker worked from home, attended functions, and provided her own transportation, these elements would not be considered a significant investment. 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. The worker received a set weekly amount 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 a written agreement. The worker was engaged as a booking agent for the firm's booking agency. She was prohibited from working for others within a specified area during the time she was working for the firm as well as for two years following the termination of her services to the firm. This would not support the 'independent contractor' nature of her services as she was unable to make her services available to the general public on a regular and consistent basis. When working for the firm, the worker was not engaged in an separate business venture. The circumstances of the firm engaging her would also not be a factor to consider when evaluating the work relationship. The worker services were essential and integral to the firm's business activities. 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.

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.