

SS-8 Determination—Determination for Public Inspection

Occupation 02LRP Loan Processor	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 merchant cash advances/loans to businesses. The worker was engaged as an approval specialist and/or loan processor. The worker received a 2016 Form 1099-MISC for his services. There was no written agreement.

The firm indicated that the worker was given no specific instructions other than where to mail the client file; he received his work assignments through the firm's CRM (customer relationship management alerts). The worker noted that he received instructions from the firm daily as well as loan submissions to process. He also received loan submissions from the firm's sales associates. Each party indicated that the other determined the methods by which the assignments were performed; but agreed that the firm would be contacted if any issues or problems arose. The worker's reports consisted of processing loans. His work routine was to arrive first thing in the morning, work until late afternoon; he would often stay later as he was told he was on salary. However, the firm indicated that the worker had no set schedule or hours and that he could work wherever there was internet. The worker added that he had to submit a request for time off and that he only worked at the firm's office. The worker was required to attend daily meetings though the firm disagreed. The worker was to provide the services personally with only the firm hiring and paying any substitutes.

The firm noted that it only provided wifi access and that the worker provided a computer and net access. The worker, however, noted that the firm provided all materials. The worker received a salary as well as commission and had no other economic risk. The customer paid the firm. Both agreed that the firm established the level of payment for services.

The firm indicated that there were no benefits. Both parties agreed that either party could terminate the relationship without incurring a liability. The worker did not perform similar services for others; the firm disagreed. 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. 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. While the firm may not have provided specific instructions, it is reasonable to assume that the worker received some instructions and directions, even if just initially. The firm engaged the worker as a loan processor and gave the worker his work assignments no matter by what means. The firm remained responsible to its clients. The worker worked in the firm's office during regular business hours. If the work is performed on the premises of the person or persons for whom the services are performed, that factor suggests control over the worker, especially if the work could be done elsewhere. 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. In addition, though the worker's services were for a temporary period of time, those services were continuous. 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. 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. It was the firm that had the investment in the office operations. The worker simply received a salary as well as a commission and had no other economic risk other than the loss of that compensation. 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 no written agreement. 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 even if the worker had agreed to accept a pay document indicative of an independent contractor relationship, that would not establish one. The worker was engaged to process loans for the firm's loan business. When doing so, the worker was not engaged in an separate business venture. The fact that his services were for a brief period of time did not establish a business presence for the worker. The worker's services were part of and integrated into 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 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.