

SS-8 Determination—Determination for Public Inspection

Occupation 02LRP Loan Officer	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 regarding services performed for the firm from August 2017 to September 2017 as a loan officer. The worker placed her state mortgage license under the firm so she could originate loans in the state and receive commission legally. The firm issued the worker Form W-2 for 2017. The worker filed Form SS-8 as the Form W-2 was overstated and she believes she was not an employee but rather an independent contractor who should have received Form 1099-MISC.

The firm's response states it is a mortgage brokerage business. The worker was engaged as a mortgage loan originator. The services performed included gathering documents from borrowers as required by mortgage lenders for processing and underwriting mortgage loans. The worker also checked borrowers' credit to verify they qualified for a loan. The worker was classified as an employee as required by the Consumer Financial Protection Bureau (CFPB). Services were performed under an Employment Agreement.

The firm stated the worker agreed to follow its policies and procedures in connection with services performed. The worker signed acknowledging the job requirements and duties associated with the position of outside sales loan officer, including other duties as assigned. The worker's immediate supervisor was the firm's senior management. The worker agreed to attend the firm's in-house and off-site seminars and training classes. If the firm paid for the worker's training, she would repay the firm if training occurred within the last 12-months prior to separation. The worker generated her own leads. The firm answered questions related to loan guidelines and how to satisfy loan underwriting conditions. If problems or complaints arose, the firm was contacted and assumed responsibility for problem resolution. Reports and meetings were not applicable as the firm spoke with the worker as needed. The worker worked remotely, primarily from her home office, and she was not required to work a specific number of hours. The firm required the worker to personally perform services. The worker stated the firm did not provide her specific training or instruction. She self-sourced business and determined the methods by which assignments were performed. She independently determined her routine and hours worked. The firm did not require her to personally perform services.

The firm stated it paid the cost of mortgage loan software access and checking the borrower's credit, in addition to providing business cards to the worker. The worker was required to provide and incurred the unreimbursed expense associated with a computer. She likely needed a printer as well. The worker did not lease equipment, space, or a facility. Customers paid the firm. The firm paid the worker commission; a drawing account for advances was not allowed. The firm carried workers' compensation insurance on the worker. The worker did not incur economic loss or financial risk. The firm determined the loan commission split. The worker stated she and the firm did not provide supplies, equipment, materials, or property. She incurred the unreimbursed expense associated with a flat fee per loan closed. She was paid per loan closed. She did not establish the level of payment for the services provided.

The firm stated the work relationship could be terminated by either party without incurring liability or penalty. The worker did not perform similar services for others. The employment agreement contained a one-year period related to non-solicitation of customers and employees. The firm represented the worker as vice president of mortgage lending to its customers. The work relationship ended when the worker quit. The worker stated benefits were not provided. She did not perform similar services for others as her NMLS was only allowed to sit with one brokerage at a time. She quit when she received her pay stub due to deductions reported.

Both parties agreed the worker generated her own leads. There were no reporting requirements pertaining to leads.

The employment agreement states, in part, the work relationship could be terminated by either party at any time and for any reason not contrary to law. The worker agreed to keep confidential the firm's information during employment and after termination of employment. The worker gave the firm permission to collect various expenses she incurred during her employment. The amount owed could be deducted directly from the worker's paycheck. If the worker was no longer employed by the firm and expenses were unrecoverable from the customer, the worker was solely responsible for full payment to the party to which they were due. A job duty included professionally representing the firm at all time and at all industry functions and in the presence of the firm's customers.

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.

For federal employment tax purposes, it is the actual working relationship that is controlling and not the terms of a 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.

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. In this case, the mortgage loan origination services performed by the worker were integral to the firm's business operation. As acknowledged by the worker, she had to place her license with the firm in order to legally originate loans in the state and receive commission; she was unable to perform the same or similar services for others. The employment agreement also documents the worker's acknowledgment to adhere to the firm's policies and procedures, in addition to attending required training. 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, to ensure satisfactory job performance in a manner acceptable to the firm.

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 stated she 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. As acknowledged by the firm, the worker did not incur economic loss or financial risk. Based on the commission rate of 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. As acknowledged by the worker, she could not independently perform similar services for others as her license was only allowed to sit with one brokerage at a time. 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. As the worker is found to have been a common law employee, she cannot be a statutory employee.

Taxpayers can obtain additional information related to worker classification online at www.irs.gov.