

SS-8 Determination—Determination for Public Inspection

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| Occupation 02OFF Office Worker | 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 corporation in the business as a marketing agency. The firm stated they engaged the worker as a consultant to their Vice President and then as a Regional Account Executive. The worker's services did not significantly changed throughout the entire work relationship. There was a written agreement between the two parties.

The firm stated the worker was contracted to assist the VP of Sales in the Automotive Division. The worker testified she was trained on the firm's production tool. The worker received her assignments from the firm. The firm stated the worker determined how to perform the services and the worker stated the firm determined how she should perform her services. The worker relied upon the firm to resolve her problems and complaints. The firm stated the worker was required to submit weekly sales activities and the worker stated she was required to submit sales reports, contract reports via sales force, sales matches for clients, weekly time reports and project status updates. The worker had a flexible schedule; however, the worker did state she was required to perform services 8 hrs. per day. The worker performed her services at the firm's location. The worker stated she was required to attend staff meetings, sales team meetings, program & project production management tool training. The worker was required to perform her services personally. The firm hired and paid any additional helpers or substitutes needed.

The firm provided work space, office equipment and supplies for the worker to perform her services. The worker was paid on an hourly basis. The customers paid the firm directly. The firm stated the worker could not suffer a significant loss in the performance of her duties. The firm stated the firm and worker negotiated an hourly rate for her services.

The worker received no benefits. Either party could terminate the relationship without incurring a liability. The worker did not perform similar services for others. The worker performed her services under the firm's business name. The firm terminated the worker's contract. The worker provided a copy of a weekly listing of the payments made to the worker by the firm.

We received a copy of an Unemployment Appeal by the firm and the [REDACTED] Department upheld the original decision stating the worker should have been an employee.

There were 2 Consulting Services Agreements submitted one dated October 27, 2015 and one dated June 1, 2016. This included the general duties of the worker, the hourly rate of pay, business expenses would be reimbursed and non-compete clause.

The worker provided a copy of her job description, duties and required skills as a Regional Account Executive.

The worker provided a copy of her business card listing her as a Regional Account Executive with the firm's physical address, email address and phone numbers to get in touch with the worker.

The worker provided a copy from the firm's website listing the firm's team and there was a picture of her as the firm's Regional Account Executive.

There was an email between the worker and VP dated 9-29-15 where the VP sent the worker the job description for a Regional Account Executive and requesting the worker to meet with the VP regarding accepting a position from the firm.

The worker provided a copy of a marketing campaign the firm sent out listing the worker as the Regional Account Executive.

Analysis

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.

Your statement that the worker was 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.

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 the instant case the worker performed services with the firm's Vice President and was required to answer to the Vice President which demonstrated the worker's services were integrated into the firm's daily operations. The fact the worker was the firm's Regional Account Executive also demonstrated the worker's services were integrated into the firm's daily operations.

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. In the instant case both the firm and worker stated the worker was required to perform her services personally.

A continuing relationship between the worker and the person or persons for whom the services are performed indicates that an employer-employee relationship exists. In the instant case, the worker's services began in the 2015 tax year and continued for the majority of the 2016 tax year.

The right to discharge a worker 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 so long as the independent contractor produces a result that meets the contract specifications. In the instant case, the firm did discharge the worker which demonstrated the firm did have control of the worker through the threat of dismissal.

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 the instant case, the worker could not suffer a significant loss in the performance of her duties and had not invested significant capital to perform her services for the firm.

The worker was an employee according to common law. The information provided by the both parties showed the worker was required to receive direction and control from the firm's Vice President. The worker relied upon the firm as an employer to resolve her problems and complaints. It was the firm that had the financial investment as the firm provided the worker with office space, office equipment and supplies for the worker to perform her services. Financial control was also demonstrated as the firm set the worker's hourly rate of pay in the agreement between the two parties. The worker's services either as an assistant to the Vice President or as a Regional Account Executive for the firm demonstrated the worker's services were integrated into the firm's daily operations. The fact the firm retained the right to terminate the worker demonstrated control through the threat of dismissal.

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 go to www.irs.gov for further information.

Firm: Publication 4341
Worker: Notice 989