

SS-8 Determination—Determination for Public Inspection

Occupation 02OFF Business/Computer Services/Office/Sales	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 operating a spa. According to the firm, the worker was engaged for computer support services as a document specialist, constant contact designer and website editor. She received a 2017 Form 1099-MISC for her services. There was no written agreement.

Only the worker mentioned receiving instructions from the firm in any task where she did not have skills or experience as she indicated she performed front desk duties. The firm provided the worker with her work assignments either over the phone or in person. Each party indicated that the other determined the methods by which the assignments were performed though sometimes workers' input was considered as well. Both parties agreed that the worker would contact the firm if any issues or problems arose. Only the worker mentioned providing verbal updates on tasks or the actual computer work completed. The worker worked part-time, three days a week for set scheduled hours though the firm noted that she came and went when she pleased. She set up google spreadsheets, constant contact, and emails. Her work was usually performed at the firm's location. There were meetings but the firm noted that she did not need to attend. The firm indicated that the worker was required to provide the services personally. The worker noted that only the firm would hire/pay others.

Both the firm and the worker agreed that the firm provided the computer; the worker also added that the firm supplied all equipment and supplies as well as the work location. Only the worker mentioned that she was reimbursed for any supplies she picked up during errands that she ran for the firm as well as some of her fuel costs. The worker was paid an hourly rate; the firm noted that the worker charged the firm bi-weekly for her services. No evidence was provided showing bi-weekly invoicing to the firm. Both agreed that the worker had no other economic risk. Both also agreed that the customer paid the firm. Each party indicated that the other established the level of payment for services.

Both the firm and the worker agreed that there were no benefits with the worker mentioning that she was allowed a flexible work schedule. Either party could terminate the relationship without incurring a liability. She did not perform similar services for others though the firm disagreed. The worker noted that she was represented by the firm as their front desk person. The relationship ended when the worker quit. The firm noted that the contract ended; however, there was no contract.

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 worker was engaged to provide computer-related services. Many workers have skills and experience acquired throughout their working life; however, possessing skills do not automatically make them self-employed when working for others. The worker also was allowed considerable latitude in her work schedule to accommodate her personal life. The fact that the worker worked at the firm's premises illustrated her dependence on the firm for a place to work. 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. 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.

The worker was to provide the services personally. 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. This is understandable as the worker provided other tasks such as front desk duties, filing, scheduling appointments, and cleaning. In addition, the worker provided her services on a continuous basis throughout 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. It was the firm that had the investment in the facility, equipment, and supplies. The worker received an hourly rate of pay with the firm indicating that she was paid on a bi-weekly basis; the worker had no other economic risk other than loss of her 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 were no benefits and there was no written agreement. The worker was engaged for her skills and experience in computer-related services. She worked part-time, when available, for the firm. When doing so, the worker was not engaged in an separate business venture. She did not hold herself out to the public nor have a separate business location. Her services supported the firm's continuing operations. Integration of the worker's services into the business operations generally shows that the worker is subject to direction and control.

The firm noted that the work relationship ended when the contract ended; however, no contract was provided defining the duration of the relationship. The firm also indicated that the worker was informed that she would be receiving a Form 1099-MISC which is indicative of an independent contractor relationship. However, 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.

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.