

SS-8 Determination—Determination for Public Inspection

Occupation 020FF Office Assistant	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

According to the information and documentation submitted, the firm's business is residential real estate sales. The worker performed services as an licensed Real Estate Assistant pursuant to a "Independent Contractor Agreement" regarding the relationship between the firm and worker as between Broker and Associate-Licensee. The worker handled paperwork associated with real estate transactions, helped with marketing, client contact, and showing property. The worker's duties also included transaction coordination, document/file preparation, and maintenance. The firm reported the worker's earnings on Form 1099-MISC at year end.

The firm provided the worker with her work assignments and instructions for carrying out the assignments. The worker personally performed her services at the firm's office location with occasional pick-up and delivery of marketing materials. The worker performed the services during the firm's business hours. The firm provided the office equipment and supplies needed to perform the services. The firm paid the worker a salary for her services. The firm terminated the worker's services.

Analysis

According to the information and documentation submitted by the firm and the worker concerning the work relationship, the firm provided the worker with her work assignments and provided instructions for completing the assignments. The worker personally performed her services at the firm's premises during its established business hours. The firm provided all necessary office equipment and supplies for the worker to perform her services. The worker received a salary for her services. The worker had no investment in facilities and did not have the opportunity for profit or loss. The firm terminated the worker's services without incurring any liabilities.

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.

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. We must examine the relationship of the worker and the business. We consider 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. The degree of importance of each factor varies depending on the occupation and the context in which the services are performed.

Therefore, 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.

A worker who is required to comply with another person's instructions about when, where, and how he or she is to work is ordinarily an employee. This control factor is present if the person or persons for whom the services are performed have the right to require compliance with instructions. Some employees may work without receiving instructions because they are highly proficient and conscientious workers or because the duties are so simple or familiar to them. Furthermore, the instructions, that show how to reach the desired results, may have been oral and given only once at the beginning of the relationship.

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. In such instances, the firm assumes the hazard that the services of the worker will be proportionate to the regular payments. This action warrants the assumption that, to protect its investment, the firm has the right to direct and control the performance of the workers. Also, workers are assumed to be employees if they are guaranteed a minimum salary or are given a drawing account of a specified amount that need not be repaid when it exceeds earnings.

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.

Therefore, the firm exercised direction and control over the services performed by the worker to establish that an employee/employer relationship existed.