

SS-8 Determination—Determination for Public Inspection

Occupation 02OFF Office Workers	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 homeopathic family practice. The worker was an office administrator who answered phones, scheduled appointments, filed records, received monies and performed general office work. She received a 2017 Form 1099-MISC for her services and continued to provide services in 2018 as well. There was no written agreement.

The firm noted that it provided almost no instructions and that the worker's task assignments were routine. The worker noted that she was told how to perform some services and that she received her work assignments verbally. The doctor/firm determined the methods by which the assignments were performed though the firm noted that both the worker and doctor had input. Both parties agreed that the firm would be contacted if any issues or problems arose. There were no required written reports, only verbal ones. The worker's routine was to open the store, log activity, process sales, accept payments, make appointments, pay all sales taxes, and pay all bills. The firm agreed that she opened the store and performed all the agreed upon duties. Both agreed that all her services were performed at the firm's office location. The firm indicated that the worker was to provide the services personally.

Both the firm and the worker agreed that the firm provided the office, workspace, phone, computer, furnishings and supplies. The worker was paid an hourly rate and had no other economic risk. The worker noted that her compensation was supposed to be an hourly rate but that it would be the same amount no matter the number of hours she worked. She was paid every fifteen days. Both parties agreed that she had no other economic risk other than loss of her compensation. The customer paid the firm. The firm established the level of payment for services.

Both the firm and the worker agreed that there were no benefits and 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 ended when the worker quit.

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. 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 firm engaged the worker to provide administrative services and other duties as assigned. She worked during the firm's scheduled office hours in the firm's office. The establishment of set hours of work by the person or persons for whom the services are performed is a factor indicating control. If the nature of the occupation makes fixed hours impractical, a requirement that workers be on the job at certain times is an element of control. The fact that all of her services were performed at the firm's premises also pointed to the firm's ability to direct and control the worker's activities. The worker was to provide the services personally indicating that the firm presumably was interested in the methods used to accomplish the work as well as in the results. 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. The worker had no investment. The firm provided the workplace, the workspace, equipment, tools, and supplies. The worker received an hourly rate of pay and had no other economic risk. 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.

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 to work in the firm's office. When doing so, the worker was not engaged in an separate business venture. Integration of the worker's services into the firm's 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.

The firm indicated that both parties agreed to the independent contractor relationship and referenced the fact that the worker had operated businesses previously. 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. So, the parties cannot simply agree to a relationship that is not supported by the facts.

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.