

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

Information provided indicated the firm is a real estate company. The worker performed general office duties for the firm in 2017. The firm reported the income on Form 1099-MISC, as they felt the worker was a contractor. She completed Form W-9 (attached copy was provided) and was paid by company check, instead of by the payroll service as other employees were. The firm stated the worker set the amount per hour she was to be paid. Had she been hired as an employee, the amount per hour would have been less. The firm indicated she was also given mileage reimbursements. The firm indicated she started and ended various days at differing times, working anywhere from twelve to forty-five hours per week. The firm indicated she was given a list of current trades, where to find new ones to reach out too, send prints and collect quotes. Work assignments were given from the construction manager. Work was performed at the company office. She was invited to attend bi-weekly staff meetings. The firm indicated she quit to pursue a different kind of work.

The worker has indicated she feels she should have been classified as an employee, and not an independent contractor. The worker provided a copy of an e-mail from the firm which was an offer letter of employment. It stated the e-mail was to constitute her offer to work for them, starting at the rate of twelve dollars per hour for part time up to full time employment, dependent on her choice, needs of the business, commitments to other employers etc. The firm would evaluate the work relationship every thirty days for the first ninety days to ensure both employer and employee are comfortable with delegated roles, responsibilities and productivity. She indicated she was trained how to contact contractors, and when to contact them. Instructions were given from the owner of the firm. She worked Monday through Friday eight to four and some Saturdays. All work was performed on firm premises, using their equipment and supplies. She agree she was paid by the hour plus mileage. The customer paid the firm. She indicated the firm established the hourly wage. She agreed she quit.

ANALYSIS

The question of whether an individual is an independent contractor or an employee is one that is determined through consideration of the facts of a particular case along with the application of law and regulations for worker classification issues, known as "common law." Common law flows chiefly from court decisions and is a major part of the justice system of the United States. Under the common law, the treatment of a worker as an independent contractor or an employee originates from the legal definitions developed in the law and it depends on the payer's right to direct and control the worker in the performance of his or her duties. Section 3121(d)(2) of the Code provides that the term "employee" means any individual defined as an employee by using the usual common law rules.

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.
 -If a worker must perform services in the order or sequence set by the person or persons for whom the services are performed, that factor shows that the worker is not free to follow the worker's own patterns of work. Often, because of the nature of an occupation, the person or persons for whom the services are performed do not set the order of the services or set the order infrequently. However, if the person or persons retain the right to control the order or sequence of the work, this is sufficient to indicate an employer-employee relationship.

Analysis

We have applied the above law to the information submitted. 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.

Evidence of control generally falls into three categories: behavioral control, financial control, and relationship of the parties, which are collectively referred to as the categories of evidence. In weighing the evidence, careful consideration has been given to the factors outlined below.

Factors that illustrate whether there is a right to control how a worker performs a task include training and instructions. In this case, you retained the right to change the worker's methods and to direct the worker to the extent necessary to protect your financial investment.

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.

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 your business. Both parties retained the right to terminate the work relationship at any time without incurring a liability.

CONCLUSION

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. The worker has provided a copy of the offer of employment from the firm, which clearly denotes employer/employee work relationship. The work was to be reviewed every thirty days, for first ninety day probationary period (employee). The firm provided a copy of the W-9 which they provided to her to sign (as opposed to giving her a W-4). There was no language in the offer of employment to indicate it was an independent contract agreement. All work was performed on the firm premises, utilizing the firm's equipment and supplies. Work assignments were performed as instructed by the firm.