

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 operating a law firm and the worker was engaged through a staffing agency to perform temporary secretarial services for the firm's business. The firm entered into an agreement with the staffing agency. The firm provided no training. The firm assigned worker jobs to perform and required the worker to contact the firm regarding problems or complaints for resolution. The worker provided wage statements indicating hours worked and the agency billed the firm accordingly for worker's hours and their fee per the agreement between the staffing agency and the firm. The wage stated addressed the worker's employee status and directed the firm to pay the worker directly accordingly. The work schedule was determined by the firm. The worker was required to perform the services at the firm's premises personally. The firm hired and paid substitutes or helpers if needed.

The firm provided all the equipment, materials, and supplies needed by the worker to perform the services. The worker did not lease anything or incur any business expenses. The firm reimbursed the worker for parking expenses and paid the worker an hourly wage. No drawing accounts were allowed. The firm was paid through customers. The firm was not sure if workers' compensation insurance coverage was for temporary workers or not. The worker did not establish the level of payment for the services. The staffing agency and firm determined the level of payment for services. The worker could not suffer any economic loss and had no financial risk.

The agreements were between the staffing agency and firm as well as the staffing agency and the worker. There were no contracts between the firm and worker. The firm provided no benefits. The worker did perform similar services for others and was not required to obtain the firm's prior approval to do so. The worker did not advertise as a business to the public. Both the firm and the worker retained the right to terminate the working relationship at any time without incurring any liability. The relationship ended when the regular employee returned.

Analysis

When a firm determines or retains the right to determine directly or through designation what, how, when, and where workers perform services an employer/employee relationship exists. For federal employment tax purposes, it is not necessary for firms to exert direct or continuous control nor that services be performed full-time on a fixed scheduled basis, it is sufficient that the firm retains the right to change the workers services, as they deem necessary for business purposes. This control may come from verbal instructions, training, meetings, reporting, as well as supervision. Also, the methods used by workers to perform services are not only controlled through verbal instructions but also by equipment, materials, and supplies provided. In this case, the firm not the worker had control over the methods and means used in the performance of the services. These facts evidence behavioral control by the firm over the services performed by the worker.

When a worker does not have a significant financial investment in a business requiring on-going business capital outlays with business risks an employer/employee relationship is evident. In this case, the worker had no financial business investments and no control over profit and loss due to significant business capital outlays being made. The firm had the business investment and control over profit and risk of loss with regard to the services the worker performed for the firm's business. The term "significant investment" does not include tools, instruments, and clothing commonly provided by employees in their trade; nor does it include education, experience, or training. The firm paid the worker an agreed hourly wage directly for the services and paid the employment agency a set agreed fee for providing the worker to perform services on a temporary short-term basis. The firm's customers paid the firm. The worker did not have control over the costs related to the temporary services performed for the firm's business. These facts evidence financial control by the firm over the services performed by the worker.

There was agreements indicated between the firm and the staffing agency with regard to the services the worker performed. There were no agreements between the firm and worker. The firm provided a wage reporting sheet that showed the worker's information and hours and days worked, the hourly rate of pay with instructions on paying the employee directly and the fee charged by the staffing agency for providing the employee to be paid by the firm to the staffing agency. The statement provided directions with regard to the payment of employment taxes and wages paid directly to temporary personnel. The worker did perform similar services for others and was not required to obtain the firm's prior approval to do so. Although this could be an important factor to consider in an independent contractor relationship, this factor alone would not make the worker to be an independent contractor. Many workers have more than one job at a time and may be an employee in one or all working relationships depending on the autonomy of each one. The worker did not advertise to the public as being engaged in a business. Both the firm and worker retained the right to terminate the working relationship at any time without incurring any liability. The right to discharge a worker at any time without incurring a liability for termination 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 without a liability so long as the independent contractor produces a result that meets the contract specifications. Likewise, if the worker has the right to end his or her relationship with the person for whom the services are performed at any time he or she wishes without incurring liability, that factor indicates an employer-employee relationship. The relationship ended when the full time employee returned to work after vacation.

Based on the autonomy we have determined the worker to have been an employee under common law.