

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 worker initiated the request for a determination of her work status as an office clerk and a non-commissioned salesperson in tax years 2017 and 2018. In this position she posted inventory ads on the internet, answered the phones, completed contracts for purchases, provided customer service, did filing, cleaned out repossessed sheds, and picked up trash on the lot. The firm's business is described as retail sales of portable buildings.

The firm's response was signed by the manager. The firm's business is described as sales of portable buildings, playsets, and storm shelters. The worker performed services as a salesperson.

The worker responded that she was given specific training and instructions from the owner and office manager. Her job assignments were given via phone, in-person, or email. She stated the firm determined the methods by which she performed her job and that any problems or complaints she encountered were directed to the firm for resolution. The worker's services, as described above, were rendered Monday through Friday from 8:30-4:30 in the firm's office. The worker was required to perform the services personally.

According to the firm, the worker was given training and instructions as to sales technique and the products. The worker obtained her job assignments from cold calling, ad-driven techniques, walk-ins, and word of mouth. The firm indicated the worker determined the methods by which she rendered her services. The worker was required to contact the sales manager as to the resolution of any problems or complaints. The worker's services were rendered 30-40 hours a week at the office. The firm indicated the worker was required to perform the services personally.

The firm and worker concur that the firm provided the office location, computer, and phones. The firm indicated the worker provided personal supplies, envelopes, stapler, and tape; the worker disagreed stating she furnished nothing and did not incur any expenses. The worker stated she was paid an hourly wage; the firm responded that the worker was paid a commission with a guarantee of \$XXX/week. The customers paid the firm. The worker was not covered under the firm's workers' compensation insurance policy. The worker was not at risk for a financial loss in this work relationship; the worker did not establish the level of payment for services provided or products sold.

The worker stated she was not entitled to benefits other than paid holidays; the firm indicated no benefits were extended to the worker. Either party could terminate the work relationship without incurring a liability or penalty. Both parties acknowledged the worker was not performing same or similar services for others during the same time frame. The firm responded that the worker was responsible for soliciting new customers via social media and the sales training technique she was taught. The terms of a sale included a contract and deposit. The products were sold from a retail establishment and installed at the customer location.

Analysis

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.

Training a worker by requiring an experienced employee to work with the worker, by corresponding with the worker, by requiring the worker to attend meetings, or by using other methods, indicates that the person or persons for whom the services are performed want the services performed in a particular method or manner. This is true even if the training was only given once at the beginning of the work relationship.

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.

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.

Lack of significant investment by a person in facilities or equipment used in performing services for another indicates dependence on the employer and, accordingly, the existence of an employer-employee relationship. 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. Also, if the firm has the right to control the equipment, it is unlikely the worker had an investment in facilities.

A person who can realize a profit or suffer a loss as a result of his or her services is generally an independent contractor, while the person who cannot is an employee. "Profit or loss" implies the use of capital by a person in an independent business of his or her own. The risk that a worker will not receive payment for his or her services, however, is common to both independent contractors and employees and, thus, does not constitute a sufficient economic risk to support treatment as an independent contractor. If a worker loses payment from the firm's customer for poor work, the firm shares the risk of such loss. Control of the firm over the worker would be necessary in order to reduce the risk of financial loss to the firm. The opportunity for higher earnings or of gain or loss from a commission arrangement is not considered profit or loss.

We have considered the information provided by both parties to this work relationship. 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 and business reputation and to ensure its customers' satisfaction and that its contractual obligations were met. The worker was not operating a separate and distinct business; 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. Integration of the worker's services into the 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. 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 the firm's business.

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.