

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 selling used equipment. The worker was engaged to advertise the firm's products as well as to perform other office duties as needed. The worker received a Form 1099-MISC for her services in 2017. There was a written agreement.

The worker noted that the firm provided training and instructions for all the job duties; the firm disagreed. Both parties agreed that the firm gave the worker her job assignments verbally. Each indicated that the other determined the methods by which the assignments were performed but both agreed that the firm would be contacted if any issues or problems arose. Both also agreed that there were no reports. The worker indicated that she worked set scheduled hours, Monday through Wednesday, at the firm's office. The firm noted that the worker advertised products on social media three days a week. Both agreed that there were no meetings. Only the worker noted that she was required to personally provide the services. Both parties agreed that the firm would hire and pay any substitute workers.

Both the firm and the worker agreed that the firm provided the computer, phone and office supplies. Both also agreed that the worker was paid an hourly rate and had no other economic risk. The customer paid the firm. Both parties agreed that 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 during the same time period; the firm disagreed. The relationship has ended.

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 promote its equipment sales through internet advertising. Presumably, the worker would have received some instructions as to what to advertise as well as any other job duties. The worker worked set scheduled hours and days, at the firm's premises. While 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 firm's right to direct or redirect the worker's activities would exist even if her hours varied. The fact that she worked at the firm's office was also a factor that suggested the firm's ability to retain control over the worker. This would be especially true if the work could be done elsewhere. The worker's services were for a brief period of time but were continuous and not just a one-time occurrence. 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. It was the firm that provided the workplace, workspace, computer, phone and office materials needed by the worker to provide her services. She simply received an hourly rate of pay and had no other economic risk other than the loss of that compensation. 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.

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 was a written agreement. However, the firm's belief 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. Also, please note that 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.

The worker was engaged to provide office-related services for the firm's equipment sales operation. When doing so, the worker was not engaged in a separate business venture. The fact that her services were for limited hours did not make her self-employed. 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.

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.

Please see Publication 4341 for guidance and instructions for firm compliance.