

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 an insurance agency. The worker was a customer service representative who answered phones and gathered client information. She received a Form 1099-MISC for her services in 2016, 2017 and 2018. There was no written agreement.

Both the firm and the worker agreed that there was online training provided for a specific insurance company. The worker received daily instructions from the firm/agent who determined the methods by which the assignments were performed and would be contacted if any issues or problems arose. The firm noted that worker would get phone calls and emails from clients; she asked the firm if she needed advice or assistance. The firm indicated that the corporate office decided the method but agreed that the firm would be contacted if there were any issues. No required reports though the firm noted that there would be notes in the system for all services completed for clients who called or walked-in. Both parties agreed that the worker worked during the firm's office hours at the firm's premises. The firm noted that the worker's hours varied from week to week. There were no meetings. The worker was to personally provide the services.

Both the firm and the worker agreed that the firm provided the computer, phones, office equipment, furnishings and supplies. The firm reimbursed the worker for her licensing fee. Both parties agreed that the worker was paid by the hour and had no other economic risk. The customer paid the firm. There was disagreement on who 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 relationship ended when the worker resigned.

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 operated an insurance agency and engaged the worker to work in its office providing customer/client services. There was some initial training provided and the worker provided her services during the firm's scheduled open hours. If the work is performed on the premises of the person or persons for whom the services are performed, that factor suggests control over the worker, especially if the work could be done elsewhere. Her hourly work schedule may also have varied from week to week. 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. In addition, 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.

The worker's services were continuous even though part-time. 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 in the office, equipment or supplies. She 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. 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 provide customer services for the firm's insurance agency. When doing so, the worker was not engaged in a separate business venture. Her services were part of and integrated into the firm's operations. 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.

The firm indicated that the worker was given the choice of being an employee or an independent contractor. The type of work relationship cannot be negotiated or simply agreed upon when the facts do not support the type of relationship. 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.

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.