

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 lumber as well as other construction items. The worker was engaged as an administrative assistant and salesperson. She received a Form 1099-MISC for her services in 2017; she continued to provide services in 2018 as well. The worker provided copies of pay check records showing withholdings were taken for about four months in 2018. There was no pay document of any kind provided by either party for 2018. The firm agreed that the worker should have been an employee and did not complete an SS-8 form. There was no written agreement.

The firm provided customer service training as well as instructions on how to answer phone calls and sell products. The worker received her work assignments from the firm's operations manager who determined the methods by which the assignments were performed and would be contacted if any issues or problems arose. The worker was responsible for soliciting new customers via word of mouth, making calls and returning emails. She got leads via the (firm) website, phone, online, chat box and email. There were no required reports. The worker worked set scheduled hours each weekday at the firm's premises. There were meetings. Only the firm hired and paid any substitute workers.

The firm provided the computer, desk, phone, and printer. The worker supplied some personal items. The firm reimbursed her for any office supplies needed. She was paid an hourly rate as well as a commission and had no other economic risk. The customer paid the firm. The worker did not establish the level of payment for services.

There were no benefits other than insurance. Either party could terminate the relationship without incurring a liability. The worker did not perform similar services for others. She advertised via business cards, word of mouth, and social media. The relationship ended when the worker quit.

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. 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.

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 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. This worker also received a commission; however, the opportunity for higher earnings or of gain or loss from a commission arrangement is not considered profit or loss.

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. The worker's services as an administrative assistant and salesperson were necessary and integral to the firm's business activities. 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.