

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 submitted a request for a determination of worker status in regard to services performed for the firm from March 2018 to October 2018 as an administrative assistant. The services performed by the worker included working on various assigned tasks such as updating websites and communicating with the web designer; answering calls and providing customer support; faxing and depositing checks into bank business accounts; receiving and packaging orders for shipment; picking up product from a local distributor; managing stock and inventory; shopping for office supplies and food. The firm issued the worker Form 1099-MISC for 2018. The worker filed Form SS-8 as she believes she erroneously received Form 1099-MISC.

The firm's response states its business markets online to customers purchasing branded health supplements. The worker was engaged to primarily enter data; she occasionally was told to ship orders. The worker was classified as an independent contractor as she was paid an hourly rate of pay, could work on her own time and place, received no benefits, and managed herself. Services were performed under a signed agreement.

The firm stated it provided the worker one-day of training on company specific project management. Work assignments were provided to the worker by text or phone call. The worker determined the methods by which assignments were performed. The worker could resolve problems or complaints or she could contact the firm, if needed. Reports and meetings were not required. Work hours were determined by the worker. 80% of the worker's time was spent in the firm's office if needing to use its computers, etc. The firm did not require the worker to personally perform services. Hiring substitutes or helpers did not occur during the term of this work relationship. The worker stated the firm determined the methods by which assignments were performed and assumed responsibility for problem resolution. Reports included monthly marketing numbers and keeping track of her own work hours on a spreadsheet. Her routine consisted of 9 am to 4 pm. She could leave early if all pertinent tasks were completed and the firm was informed. The firm required she personally perform services. The firm was responsible for hiring and paying substitutes or helpers.

The firm stated it provided an office and computer. The worker provided all other. The worker did not lease equipment, space, or a facility. The firm reimbursed the worker for office supplies purchased. The worker incurred the unreimbursed expense associated with travel, food, etc. Customers paid the firm. The firm paid the worker an hourly rate of pay; the worker was not allowed a drawing account for advances. The firm did not carry workers' compensation insurance on the worker. The worker did not incur economic loss or financial risk. The rate of pay was negotiated. The worker stated she did not establish the level of payment for the services provided or the products sold.

The firm stated the benefit of bonuses was made available to the worker. The work relationship could be terminated by either party without incurring liability or penalty. The worker did not perform similar services for others or advertise. There was no agreement prohibiting competition between the parties. The firm represented the worker as an independent distributor to its customers. Services were performed under the worker's personal name. The work relationship ended when the worker left the project. The worker stated there were no services performed at home.

The firm stated the worker was not responsible for soliciting new customers.

The signed agreement states, in part, the worker would perform duties on an as-needed basis as determined by the firm and worker. Duties included online sales processing and shipping, including marketing and customer service; assisting and overseeing monthly product qualifications; calling product distributors, customers, and prospects to assist them in improving their business and fulfilling orders. The worker could choose the hours and place of work. The worker would be compensated for the satisfactory performance of the firm's work, based on an hourly rate of pay, regardless to where services were performed. Bonuses could be awarded from time-to-time by the firm.

Analysis

Generally, the relationship of employer and employee exists when the person for whom the services are performed has the right to control and direct the individual who performs the services, not only as to what is to be done, but also how it is to be done. It is not necessary that the employer actually direct or control the individual, it is sufficient if he or she has the right to do so.

Section 31.3121(d)-1(a)(3) of the regulations provides that if the relationship of an employer and employee exists, the designation or description of the parties as anything other than that of employer and employee is immaterial. Thus, if an employer-employee relationship exists, any contractual designation of the employee as a partner, coadventurer, agent, or independent contractor must be disregarded.

Therefore, the firm's statement that the worker was an independent contractor pursuant to a written 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. Furthermore, whether there is an employment relationship is a question of fact and not subject to negotiation between the parties.

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. In this case, the firm trained the worker. Furthermore, the administrative support services performed by the worker were integral to the firm's business operation. The firm provided work assignments and ultimately assumed responsibility for problem resolution. These facts evidence the firm retained the right to direct and control the worker to the extent necessary to ensure satisfactory job performance in a manner acceptable to the firm. Based on the worker's education, past work experience, and work ethic the firm may not have needed to frequently exercise its right to direct and control the worker; however, the facts evidence the firm retained the right to do so if needed.

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. In this case, the worker did not invest capital or assume business risks. 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. As acknowledged by the firm, the worker did not incur economic loss or financial risk. Based on the hourly rate of pay arrangement the worker could not realize a profit or incur a 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. 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. Both parties retained the right to terminate the work relationship at any time without incurring a liability. There is no evidence to suggest the worker performed similar services for others as an independent contractor or advertised business services to the general public during the term of this work relationship. The classification of a worker as an independent contractor should not be based primarily on the fact that a worker's services may be used on a temporary, part-time, or as-needed basis. As noted above, common law factors are considered when examining the worker classification issue.

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.

The firm can obtain additional information related to worker classification online at www.irs.gov; Publication 4341.