

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 insurance producer in tax year 2018, for which she received Form 1099-MISC. In this position she opened and closed the office, clocked in/out on a program supplied by the firm, answered the phone, serviced accounts, worked quotes, took payments, binded policies, and answered questions. The firm's business is described as an insurance company.

The firm's response was signed by the president/insurance agent. The firm's business is an insurance broker. The worker provided services April 30, 2018 to November 24, 2018 quoting and issuing insurance policies, proposals, claims – normal insurance steps. She received her insurance certificate on 6/21/2018.

The worker stated she was given specific training and instructions as to the computer system and quoting and binding; she had never done insurance before so the firm taught her everything from A-Z. Job assignments were given verbally, email, or via text. The firm determined the methods by which the worker's services were performed. Any problems or complaints encountered by the worker were directed to the firm for resolution. The worker provided production reports. The worker performed her services at the firm's office unless she had to take photos of property to be insured. The worker was required to perform the services personally; any additional personnel were hired and paid by the firm.

According to the firm, there was no training and/or instructions given to the worker; she received and paid for her insurance education. The worker's job assignments were as a result of customers calling in. The Insurance Company determined the methods by which the worker's services were performed. The firm did not indicate who would handle any problems or complaints encountered by the worker. The workers services were rendered starting at 8am, working with customers in need of insurance or claims, and travel to sites, if needed. The worker performed her services at the firm's location, until she was able to form a business of her own. The worker was required to perform the services personally. Any additional personnel were hired and paid by the worker; the firm's approval was not required.

The worker responded that the firm provided everything. She used her cellphone for taking pictures. The worker did not lease equipment, space, or a facility. She stated the firm paid her an hourly wage and a bonus for meeting the firm's goal. The customers paid the firm. She indicated she was covered under the firm's workers' compensation insurance policy. The worker was not at risk for a financial loss in this work relationship. The firm or Insurance Company established the level of payment for services provided or products sold.

The firm did not respond as to whether any equipment, property, materials or supplies were provided during this work relationship. The worker furnished training courses and state exams. The worker did not lease equipment, space, or a facility. The firm indicated the worker was paid a commission and she was not guaranteed a minimum amount of pay and was not allowed a drawing account for advances. The customers paid the insurance company who paid the firm who then paid the worker. The worker was not covered under the firm's workers' compensation insurance policy. The worker's risk factor was considered not applicable. The worker did not establish level of payment for services provided or products sold, the Insurance Company did.

The worker indicated there were no benefits extended to her other than a possible bonus. Either party could terminate the work relationship without incurring a liability or penalty. The worker stated she was not performing same or similar services for others during the same time frame; she was a captive producer and could not sell insurance for any other agency. Her responsibility was to services existing customers; she took care customers who walked into the office. The customer reviews were written by the worker; but, had to be signed by the firm. There was an underwriting book that had to be followed and all orders were subject to the firm's approval. She did not sell life insurance.

The firm responded that no benefits were made available to the worker. Either party could terminate the work relationship without incurring a liability or penalty. The firm stated the worker was performing same or similar services for others during the same time frame and the firm's approval was not required. The worker had no responsibility to solicit new customers; she generated her leads and she issued insurance policies to policy holders. The worker was not required to submit orders to the firm for the firm's approval. The worker sold 100% of other types of insurance (not life insurance) from the firm's business location. The worker was just starting out in the industry, and services were rendered under her personal name.

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.

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. Work done off the premises of the person or persons receiving the services, such as at the office of the worker, indicates some freedom from control. However, this fact by itself does not mean that the worker is not an employee. The importance of this factor depends on the nature of the service involved and the extent to which an employer generally would require that employees perform such services on the employer's premises.

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.