

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 a lead generator in tax year 2018, for which she received Form 1099-MISC. In this position she contacted leads and assisted salesperson in scheduling appointments. She did not seek out leads; she primarily did follow-ups when meetings fell through. There were four to five salespeople in addition to the owner that she would schedule appointments for. The firm's business is described as insurance sales.

The firm's response was signed by the owner. The firm's business is an insurance agency; and, the worker provided services as a lead generator.

The worker indicated there were weekly meetings with the team to learn skills to improve performance. The job assignments were directed by a salesperson who oversaw the lead generators. 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. She was required to provide daily activities sheet, weekly tracking report, and tracking of her hours. At the start of her shift she was to respond to messages, contact potential customers, and do occasional up keep of the office, with services primarily rendered on the firm's premises. She seldom worked remotely; however, when she did she would respond to online customer contact and scheduling, otherwise she would have to use her phone and she did not want prospective clients having her personal telephone number. She generally worked afternoon/evenings about four hours/day; the office closed by 7pm. She was required to attend the team meetings, and noted that failure to attend could result in being let go. The worker was not required to perform the services personally; any additional personnel were hired and paid by the firm.

The firm responded the worker was provided with a login to input potential new customer information. The worker's job assignments were self-generated. There was no response as to who 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. On a periodic basis, the worker was to input customer information into the computer software that was available to the firm's employees. The employees would then contact potential new customers, and the worker would be paid based on the information obtained. The worker's services were rendered 100% from her home. The worker was required to perform the services personally.

The worker stated the firm provided office supplies, phone, laptop, printer, and office space. The worker had the option of furnishing a laptop. She did not lease equipment, space, or a facility. She was paid an hourly wage and commission of one dollar for every appointment she followed though on and for every confirmed appointment she received three dollars. The customers paid the firm. The worker was not covered under the firm's workers' compensation insurance policy. She indicated a financial loss/economic risk was not applicable in this work relationship.

The firm's response indicated the firm provided nothing; but, stated the worker furnished computer, Internet connection, and office supplies. The worker did not lease equipment, space, or a facility. The firm paid the worker a commission and the customers paid the firm. The worker was covered under the firm's workers' compensation insurance policy. The worker was at risk for a financial loss in this work relationship if damage to her computer and travel expenses. The worker established the level of payment for the services provided.

Both parties acknowledged there were no benefits offered to the worker; however the worker responded that bonuses were possible. Either party could terminate the work relationship without incurring a liability or penalty. The worker was not performing same or similar services for others during the same time frame. The worker indicated she performed services as a representative under the firm's business name. The firm stated the worker would knock on doors to identify potential customers and input the information into the computer for employees to make contact. The worker disagreed; she stated she never sought out leads and never went and knocked on doors. The worker terminated the work relationship.

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.

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

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 www.irs.gov for more information including Publication 4341 Information Guide for Employers Filing Form 941 or Form 944 Frequently Asked Questions about the Reclassification of Workers as Employees and Publication 15 (Circular E) Employer's Tax Guide