

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 December 2016 to October 2019 as an office worker. The services performed included filing, answering the phone, lease billing, and the filing of documents with the appropriate state counties. The firm issued the worker Form 1099-MISC for the years in question. The worker filed Form SS-8 as she believes she received Form 1099-MISC in error.

The firm's response states it is an oil and gas, land, and title broker business. The worker was engaged to perform clerical work such as filing and answering phones. The worker was classified as an independent contractor as she set her own hours, took other jobs, and did not request any permission.

The firm stated it did not provide the worker specific training or instruction. Work assignments were communicated to the worker verbally or documents, with instructions, were left in her work area. The worker determined the methods by which assignments were performed. If problems or complaints arose, the person who assigned the task was contacted and assumed responsibility for problem resolution. The worker came and left during office hours of 8 am to 5 pm. Services were performed at the firm's premises. There were no penalties if the worker was unable to attend a meeting. The firm did not require the worker to personally perform services. Substitutes or helpers were not applicable. The worker stated the firm trained her on how to do lease billings and instructed her on how to file documents with the counties. The firm determined the methods by which assignments were performed. She was expected to be in office from 8 am to 5 pm, Monday through Friday. The firm required she attend occasional staff meetings. The firm required she personally perform services. The firm hired and paid substitutes or helpers.

The firm stated it provided a desk, computer, and chair. The worker did not provide supplies, equipment, or materials. The worker did not lease equipment, space, or a facility. The worker incurred the expense of travel. The firm reimbursed her for mileage outside of traveling to its office. Customers paid the firm. The firm paid the worker commission; a drawing account for advances was not allowed. The firm did not carry workers' compensation insurance on the worker. The firm established the level of payment for the services provided. The worker stated the firm also provided a phone, email access, parking, office supplies, and reimbursement for expenses incurred. She did not incur expenses in the performance of services for the firm. The firm paid her a fixed daily rate of pay. A copy of the firm's employment offer letter was provided for our review. She did not incur economic loss or financial risk.

The firm stated the work relationship could be terminated by either party without incurring liability or penalty. The worker performed similar services for others; the firm's approval was not required for her to do so. There was no agreement prohibiting competition between the parties. It is unknown if the worker advertised. The firm did not represent the worker to its customers. The work relationship ended when the job was completed and there was no more work. The worker stated she did not perform similar services for others or advertise. Services were performed under the firm's business name.

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, a statement that a worker is an independent contractor pursuant to a written or verbal 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.

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 clerical support services performed by the worker were integral to the firm's business operation. The firm provided work assignments and specific instructions, in addition to assuming 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.

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. 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. Based on the commission or fixed daily 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.