

SS-8 Determination—Determination for Public Inspection

Occupation OFF02.259 AdministrativeAssist	Determination: <input checked="" type="checkbox"/> Employee <input type="checkbox"/> Contractor
UILC	Third Party Communication: <input checked="" type="checkbox"/> None <input type="checkbox"/> Yes

Facts of Case

The worker requested a determination of employment status for services performed for the payer in 2014-2017 as a real estate assistant. The payer is a real estate agent and responded to our request for information as follows:

The payer is a licensed real estate agent. The worker was an independent contractor and did not have a title. She collected data for the payer's listings, maintained MLS records, designed and distributed marketing materials, organized and hosted catering events, wrote weblog articles, scouted locations and organized video shoots. The payer believes the worker was correctly treated as an independent contractor because she set her own hours, worked out of her own home, used her own computer, materials and automobile. She was free to turn down assignments, and often did. She set her own fees. The firm assigned the projects but did not supervise the worker in completing the projects. There was no written agreement. There was no guaranteed amount of work as work was based on payer's listings. The worker was free to offer similar services for others. Either party could have terminated without liability. The payer showed the worker how to use the MLS database. The worker did not have any formal training. The payer discussed possible weblog topics by email or phone once or twice a week and the payer informed the worker when he received new listings. The worker determined her own methods. The worker handled most problems on her own and the payer only stepped in when the problem involved the listing client. The worker submitted an invoice to the payer bimonthly which detailed what was owed and gave a detailed description of what was done. The worker performed her services from her home. The payer provided the MLS listing services and company access to the intranet. The worker used her own equipment. Customers paid the payer directly. The worker received no benefits.

Analysis

As is the case in almost all worker classification cases, some facts point to an employment relationship while other facts indicate independent contractor status. 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.

Evidence of control generally falls into three categories: behavioral control, financial control, and relationship of the parties, which are collectively referred to as the categories of evidence. In weighing the evidence, careful consideration has been given to the factors outlined below.

A statement that the worker was an independent contractor pursuant to an 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.

Factors that illustrate whether there is a right to control how a worker performs a task include training and instructions. In this case, you retained the right to change the worker's methods and to direct the worker to the extent necessary to protect your 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. The worker received her assignments from you. She assisted you in your position. Although the worker had a lot of flexibility while performing her services, you maintained the right, even if you did not exercise it, to direct and control the worker in the performance of her services.

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. The worker was assisting you. She was not operating her own business.

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. 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.

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. The worker had no investment in your business and could not suffer a loss.

Based on the above analysis, we conclude that you 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.

Firm: For further information please go to www.irs.gov Publication 4341