

SS-8 Determination—Determination for Public Inspection

Occupation 02REC Business	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 firm is in the business of providing financial planning services. The worker was engaged as a recruiter of new financial planners. She received a 2016 Form 1099-MISC for her services. There was no written agreement.

Both the firm and the worker agreed that the worker received on-the-job training. The worker received her work assignments from the firm through its data base and paper work of prospects. The firm described that it gave her an annual goal of recruits and it was up to her to complete the work. According to the worker, she maintained the firm database, networked within a chamber of commerce as well as other networking events and maintained a free linkedin profile. In addition to self-generated leads, the worker was provided with leads from other workers and the firm. Each party indicated that the other determined the methods of assignment but agreed that the firm would be contacted if any issues or problems arose. Both parties agreed that the worker submitted verbal reports; the number of calls and interviews were turned in every week. The worker added that there was an expected minimum to meet. The worker's routine was to arrive in the morning, check voice mail and emails, call prospective recruits, check-in with boss, make sure the interns knew what to do each day, research recruits, and perform interviews. The firm noted that the worker determined her own daily routine and schedule. The worker noted that she worked at the district main office, off-site for some interviews and from home. The firm agreed that work was performed at those various locations. There were meetings, however, the firm noted that the worker was not required to attend. There was a once a week recruiting meeting to discuss goals, reporting on Friday to the network office, and a recruiting meeting once a month. Both parties agreed that the worker was required to provide the services personally. Each party indicated that the other would hire and pay any substitutes or helpers.

The firm noted that it provided general office supplies; however the worker included that the firm also provided office space, a computer, phone, business cards and marketing materials. The firm reimbursed her for mileage; the worker also included reimbursement for receipted interview meals. Both the firm and the worker agreed that the worker was paid a monthly salary as well as incentives based on placed candidates. Both also agreed that the worker had no other economic risk. Only the worker indicated that the firm established the level of payment for services.

Both the firm and the worker agreed that there were no benefits. Only the firm noted that either party could terminate the relationship without incurring a liability or penalty. The worker did not perform similar services for others during the same time period. The firm provided all of the advertising. The worker noted that she was represented as an employee; the firm noted that she was a recruiter. The relationship ended when the worker resigned and moved.

Analysis

In determining whether an individual is an employee or an independent contractor under the common law, all evidence of both control and lack of control or independence must be considered. The relationship of the worker and the business must be examined. Facts that show a right to direct or control how the worker performs the specific tasks for which he or she is hired, who controls the financial aspects of the worker's activities, and how the parties perceive their relationship should be considered. 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.

Factors that illustrate whether there is a right to control how a worker performs a task include training and instructions. 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. The worker had no experience as a recruiter and was provided with on-the-job training by the firm. 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. The worker worked variable hours at different locations which included the firm's premises. 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 worker provided her services on a continuous basis throughout the time period involved, even if temporarily. A continuing relationship between the worker and the person or persons for whom the services are performed indicates that an employer-employee relationship exists. A continuing relationship may exist where work is performed in frequently recurring although irregular intervals.

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. The worker received a set monthly rate of pay along with incentives and had no other economic risk. She was reimbursed by the firm for specific receipted expenses. 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.

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. There were no benefits and there was no written agreement. The worker was engaged as a recruiter for the firm. When doing so, the worker was not engaged in a separate business enterprise. In fact, the firm acknowledged that she was inexperienced as a recruiter. Her services instead were integrated into the firm's continuing operations. 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 firm indicated that both parties agreed to the independent contractor relationship. However, in *Bartels v. Birmingham*, 332 U.S. 126, 1947-2 C. B. 174, the Supreme Court stated that whether there is an employment relationship is a question of fact and not subject to negotiation between the parties. While the worker's services may have only been temporary, there is no difference for federal income tax withholding, Federal Insurance Contributions Act (FICA), and Federal Unemployment Tax Act (FUTA) between full-time employees, part-time employees and employees hired for short time periods if the necessary direction and control by the firm exists establishing an employment relationship.

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.

Please see Publication 4341 for guidance and instructions for firm compliance.