

SS-8 Determination—Determination for Public Inspection

Occupation 02RET Retail 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 store manager and store accountant in tax years 2018 to 2019, for which she received Form 1099-MISC. The worker in addition to performing the duties identified on the Jobs/Duties list, provided financial reporting through [REDACTED], a free on-line software. The firm's business is described as hemp/CBD dispensary products, wholesale and retail.

The firm's response was signed by the owner. The firm's business is hemp dispensary. The worker provided services as filing taxes and financial reports.

The firm and worker acknowledge that the worker was given training and instructions as to job duties and expectations and as to the work and filing of taxes and end of the month numbers. The worker was verbally told what to do by the firm. The firm responded that the worker determined the methods by which the worker's services were performed; the worker disagreed, stating the firm determined how tasks would be done. Any problems or complaints encountered by the worker were directed to the firm for resolution. Both parties agree that the worker performed services at the firm's business location and at the worker's home and the worker was required to attend weekly meetings. The worker was required to perform the services personally; and, any additional personnel were hired and paid by the firm.

The firm responded the worker was provided with a computer; the worker added that the firm provided staff shirts, training/education on products, product testing at staff meetings, and store keys. The worker did not furnish anything and only incurred the gas expense of driving to and from work. The worker did not lease equipment, space, or a facility. The firm paid the worker an hourly wage; the customers paid the firm. Both parties agree the worker was not covered under the firm's workers' compensation insurance policy, the worker was not at risk for a financial loss in this work relationship, and the worker did not establish level of payment for services provided or products sold.

The firm and worker concur there were no benefits extended to the worker other than bonuses. The worker responded she was not performing same or similar services for others during the same time frame; the firm disagreed, stating the worker was performing same or similar services for others during the same time frame and was required to get approval from the firm because of the non-compete clause. The firm and worker agree the worker quit.

The worker provided a copy of the firm's jobs/duties list for the store manager, assistant manager, bud tender, and the expectations that pertained to everyone, in addition to the firm's Mission Statement, signed and dated by both parties. A signed copy of the Non-Compete Agreement was also submitted as well as the signed and dated acknowledgment of the Associate Handbook by the firm and worker.

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.

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.