

SS-8 Determination—Determination for Public Inspection

Occupation Business/Computer Services/Office/Sales	Determination: <input type="checkbox"/> Employee <input type="checkbox"/> Contractor
UILC	Third Party Communication: <input 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 is seeking a determination of worker classification for services performed as a sales associate for the firm from February 2017 until April 2019. The worker received a W-2 and a 1099-MISC from the firm for 2017, and a 1099-MISC from the firm for 2018 and 2019. The worker states that their job responsibilities and title did not change following the reclassification, and therefore they were misclassified by the firm as an independent contractor. There were no written agreements between the parties.

The firm states that it is a cooperative mall that rents space out to small local businesses and individuals. The firm hired the worker as an employee, assisting customers, until the worker started to sell their artwork in the mall and became a vendor. The worker continued to offer sales and customer assistance to the mall in addition to becoming a vendor after the time that they were reclassified by the firm as an independent contractor. The worker agreed to continue checking out customers, tidying up, and assisting the mall as a whole after the reclassification to an independent contractor. The firm continued to pay the worker an hourly wage to be credited to the worker's sales. The firm provided a copy of the worker's job application, social media screenshots from the worker after the worker was only a vendor (year not requested in determination and after work relationship ended), and settlement reports. Some of the settlement reports included were after the conclusion of the actual work relationship and do not apply to the determination process as they were solely for costs of goods sold and not services provided by the worker.

The firm states that they gave the worker employee training when they were first hired on check-out, assisting customers, and the POS system. Once the worker became a seller at the mall, they worked independently. The worker knew the daily tasks involved and was given specific instruction as needed. The worker determined the methods by which job assignments were performed. The firm and worker worked as a cooperative to address any problems or issues that arose during the job duties. There were no reports required of the worker. The worker would assist with opening the doors, checking customers out, assisting in sales, tidying, and locking up the mall. All job duties were performed at the firm's mall premises. The worker attended meetings that were held for all members of the cooperative mall. The firm required the worker to personally perform services. No helpers or substitutes were applicable. The worker states that they received on the job training, daily job responsibilities, job requirements, and work schedules from the firm. The firm's owners and management would provide the worker with job assignments and monthly schedules. The firm determined the methods by which job assignments were performed and assumed responsibility for problem resolution. There were no reports required of the worker. The worker performed services Monday through Sunday for typically 30-45 hours a week depending upon their issued schedule. Their job duties included opening and closing the store, running the cash register, and assisting customers. All job duties were performed at the firm's premises. The worker was required to attend weekly staff meetings, with the penalty of being written up if they did not attend. The firm required the worker to personally perform services. The firm was responsible for hiring and paying all helpers needed.

The firm states that it provided the building, POS system, and cleaning and office supplies. The worker provided their own art to sell. The firm indicated that there was a lease agreement in an attached independent contractor agreement, but this was not provided by the firm as stated in their response. The worker did not incur any expenses during their job duties for the firm. The firm paid the worker an hourly wage with access to a drawing account as needed. Customers paid the firm. The worker's items sold were given credit and paid out at the end of the month. The firm did not carry worker's compensation insurance on the worker. There was no financial risk experienced by the worker when providing services for the firm, only financial risks involved with the sale of their art. The firm and worker jointly determined the level of payment for services provided. The worker states that the firm provided all supplies, equipment, materials, and property. The worker did not lease any space, facilities, or equipment. The worker did not incur any expenses and was paid an hourly wage by the firm. The worker was not allowed access to a drawing account for advances. The firm did not carry worker's compensation insurance on the worker. The worker faced no economic loss or financial risk. The individual vendors of the mall and the firm established the level of payment for services.

The firm states that it did not provide the worker with any benefits. The relationship between the parties could be terminated by either party without liability or penalty. The worker did not provide similar services for other firms and did not need approval from the firm to do so. The worker was not to share proprietary or confidential mall information with outside sources. The worker was not a member of a union. The worker advertised their art on social media but did not advertise their services to the public. The worker was represented by the firm as staff and a vendor at the firm's location. The worker stopped performing services for the firm when they found a full-time design job. The worker states that there were no benefits offered by the firm. The relationship between the parties could be terminated by either party without liability or penalty. The worker did not perform similar services for other firms. There were no non-compete agreements in place between the parties. The worker was not a member of a union and did not advertise their services to the public. The worker was represented by the firm as an employee performing services under the firm's 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, co-adventurer, 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.

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. In this case, the firm required the worker to personally perform services. Furthermore, the services performed by the worker were integral to the firm's business operation. The firm provided work assignments by virtue of the customers served, and assumed 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.

Payment by the hour, day, 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. In this case, the worker did not invest capital or assume business risks. The worker's provision of services did not expose them to any financial risk or economic loss. 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 hourly 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. The separate relationship between the parties as vendor and re-seller should not be considered in regards to the provision of services by the worker. 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.

The worker's two distinct relationships with the firm, one providing services, and one as a vendor selling art, should not be combined when considering the actual work relationship. The services themselves did not change from the W-2 employee classification from 2017 through 2019. Therefore, the worker remains as a common law employee despite their reclassification by the firm.

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 selling of goods and the provision of services were two separate relationships, and the provision of services is the basis for this result.

The firm can obtain additional information related to worker classification online at www.irs.gov; Publication 4341.