

SS-8 Determination—Determination for Public Inspection

Occupation 02SAL Salespersons	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 automotive sales business. The worker was engaged by the firm as a sales manager. The firm reported the worker's remuneration on Form 1099-MISC for 2017, and did not withhold taxes from the worker's pay in 2018.

Information from the parties supports that the firm relied upon the worker's prior training and experience to perform his services. The firm stated that the worker was able to come and go as he saw fit. The worker performed his services on the firm's premises. He was required to perform his services personally.

The firm provided the office equipment and property. The worker did not incur expenses in the performance of his services. The firm paid the worker on a salary and commission basis, with a guaranteed amount per month. The worker was not allowed a drawing account for advances. The firm stated that it did not cover the worker under workers' compensation. Customers paid the firm directly at prices established by the firm. Neither party indicated an investment by the worker in the firm or a related business, or the risk of the worker incurring a financial loss beyond the normal loss of compensation.

The worker obtained his job through an application process. The firm did not make benefits available to the worker. The worker did not advertise his services or provide similar services for others during the same time period. Both parties reserved the right to terminate the work relationship without incurring a penalty or liability. It appears the firm terminated the work relationship.

Analysis

Factors that illustrate whether there was a right to control how a worker performed a task include training and instructions. In this case, the firm relied upon the worker's prior training and experience to perform his services. 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 firm must have 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 was required to perform his services personally, meaning that he could not engage and pay others to perform services for the firm on his behalf. 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. These facts show that the firm retained behavioral control over the services of the worker.

Factors that illustrate whether there was 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. "Profit or loss" implies the use of capital by a person in an independent business of his or her own. 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 firm paid the worker on a salary plus commission basis. Workers are assumed to be employees if they are guaranteed a minimum salary. The opportunity for higher earnings or of gain or loss from a commission arrangement is not considered profit or loss. These facts show that the firm retained control over the financial aspects of the worker's services.

Factors that illustrate how the parties perceived 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 were part of the service recipient's regular business activities. In this case, the worker performed his services on a continuing basis. He performed his services under the firm's name. The worker was not engaged in an independent enterprise, but rather the services performed by the worker as a sales manager were a necessary and integral part of the firm's automotive sales business. 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. Although the firm did not make benefits available to the worker, neither party incurred liability or penalty when the work relationship terminated, a factor indicating an employer-employee relationship. These facts show that the firm retained control over the work relationship and services of the worker.

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.