

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

Information provided indicates the firm is a newspaper and magazine publishing company. The firm indicated the worker had been retained by the them in 2017 to help generate sales for a separate edition of their magazine. He completed a W9 Form and signed a very clear and concise independent contract agreement. Both parties provided a copy of that agreement, that specifically stated he would be an independent contractor responsible for his own taxes and not considered an employee. The firm stated he was paid to generate sales for a separate edition of their magazine. The firm does not have an office location where the worker lives. He generated his own leads and solicited sales from prospective clients by phone or in person, on his own schedule. He was to maintain a separate office and bear all expenses and obligations in connection with providing any services for the firm. The firm stated they did not direct or have the ability to direct the time or manner in which he rendered his services. The firm did not know at any given time whether he was working for their firm or for someone else. The firm indicated he did not report the schedule or number of hours worked to them. They did not provide sales training. They did train him in their product, pricing and company, and were available for questions and advice as needed. He was an experienced sales rep, therefore did not need training in sales. He was free to do other work and provide service to other companies. They assumed he was working elsewhere as he generated so little revenue for the company per month.

The worker agrees he was hired to sell advertising space and agrees there was an independent contract agreement. He states however, he was under the direction and control of the firm. He indicated he was provided with sales training, IT system and CRM database training, collecting/depositing money. He was directed to sell ads and given a monthly goal from the publisher. He reported to the sales manager or advertising director for any issues. He provided activity reports and sales forecasts to the firm, utilizing required invoice forms for the clients. He agreed the account calls were assigned to designated area. He indicated he attended sales, staff and monthly meetings. He indicated he would have been terminated if he did not attend. The firm provided the magazine, company shirts, company e-mail account, business cards (that indicated he was an Account Executive), CRM database, deposit forms, warehouse, cell phone and auto reimbursements. He was paid on retainer and commissions. the customer paid the firm. Either party could terminate the work relationship without incurring a penalty or liability. He did not perform similar services for others. He was represented as an Account Executive for the magazine. All work performed under the firm's business name. He indicated the firm terminated the contract.

ANALYSIS

The question of whether an individual is an independent contractor or an employee is one that is determined through consideration of the facts of a particular case along with the application of law and regulations for worker classification issues, known as "common law." Common law flows chiefly from court decisions and is a major part of the justice system of the United States. Under the common law, the treatment of a worker as an independent contractor or an employee originates from the legal definitions developed in the law and it depends on the payer's right to direct and control the worker in the performance of his or her duties. Section 3121(d)(2) of the Code provides that the term "employee" means any individual defined as an employee by using the usual common law rules.

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.

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. We must examine the relationship of the worker and the business. We consider 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. The degree of importance of each factor varies depending on the occupation and the context in which the services are performed. Therefore, your 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.

-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 requirement that the worker submit regular or written reports to the person or persons for whom the services are performed indicates a degree of control.

Analysis

continued...

- If the person or persons for whom the services are performed ordinarily pay the worker's business and/or traveling expenses, the worker is ordinarily an employee. An employer, to be able to control expenses, generally retains the right to regulate and direct the worker's business activities.

-The fact that the person or persons for whom the services are performed furnish significant tools, materials, and other equipment tends to show the existence of an employer-employee relationship. Special rules apply with respect to certain types of facilities, such as home offices.

We have applied the above law to the information submitted. 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.

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.

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.

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 your business. Both parties retained the right to terminate the work relationship at any time without incurring a liability.

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. The worker was required to attend mandatory sales meetings, provide reports, had a sales quota and deadlines. He was represented as an account executive of the firm, with company shirts and business cards provided. He was guaranteed a retainer, plus commissions, reimbursements for phone and gas expenses. The firm required him to maintain a valid driver's license, insurance and clean driving record, with termination if that did not happen. The firm paid for travel and lodging expenses pertaining to required mandatory trade shows.