

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 business as a wholesaler. The worker was initially engaged as the firm's national sales manager handling sales/marketing for specific products; he was to develop new business leads as well. He received a 2016 Form W-2 and a Form 1099-MISC; he also received a Form 1099-MISC for his services in 2017, and continued to provide services in 2018. There was no written agreement other than an initial offer letter confirming the worker's position as the firm's national sales manager.

The firm provided general instructions on what to do, such as generate leads, business expectations, and pricing. They provided the worker with his assignments via email, phone and meetings. The firm/managing partners determined the methods by which the assignments were performed, with the worker noting that methods were generally understood marketing and sales strategies. Both parties agreed that the firm was contacted if any issues or problems arose. The worker submitted appointment reports, sale call reports, and follow-up opportunities from tradeshow and conferences. The worker controlled his own schedule whether he worked from home or attended tradeshow. Both agreed that there were no formal required meetings to attend. There was disagreement on whether or not the worker was required to provide the services personally. The firm noted that the worker hired brokers to work with him but that they would be paid by the firm.

Both the firm and the worker agreed that the firm provided the computer, printer, office supplies, phone, and marketing materials. Both parties agreed that the worker incurred travel, business meals, and mileage expenses for which he was reimbursed by the firm. Both agreed that the worker was paid a weekly set salary and had no other economic risk. The firm added that the worker would have to return firm's equipment (presumably when the relationship ended.) The customer paid the firm. The firm established the level of payment for services though the firm noted that it was mutually agreed upon.

There were no benefits according to the firm; however, the worker noted that he received a paid vacation, paid holidays and bonuses. Both parties agreed that either party could terminate the relationship without incurring a liability. Both agreed that the worker did not perform similar services for others; however, the firm indicated that he could with the firm's approval. The firm indicated that the worker was presented as a representative/employee working under the firm's name. The worker was responsible for finding and acquiring new customers through brokers and tradeshow. He received leads via networking and tradeshow. Leads and plans of action would be discussed with the firm. All orders were submitted to and subject to approval by the firm. The firm determined the worker's territory. The relationship ended when the worker was let go.

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. 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 firm initially engaged the worker as its sales manager. The worker had previous work experience and therefore did not require extensive instructions. Based on his experience and job position, the firm gave him considerable latitude regarding his schedule and direct supervision. This was understandable as he worked from home and the job required the attendance at tradeshow and conference. The worker may have been given the authority to engage brokers, however, those would be paid by the firm according to the information provided. Furthermore, the worker's services were continuous throughout the entire time period. 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. All of these elements existed during the entire work relationship supporting the fact that the firm continued to maintain the right to exercise control over the worker and redirect his services as necessary.

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 was paid a set weekly amount and had no other economic risk other than the loss of his compensation. 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. In addition, his business travel expenses were reimbursed by the firm throughout the time period involved. 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.

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 was no written agreement addressing an independent contractor arrangement. The worker was engaged to provide sales and marketing services for the firm's wholesale operations. When doing so, the worker was not engaged in a separate business venture. The fact that the firm changed their treatment of the worker because of incorrect state withholding was not a valid reason or a change in his services. The firm's additional compensation to the worker for self-employment taxes also did not justify the firm's change. The firm indicated that it 'converted' the worker to non-employee status. This 'conversion' did not establish a business presence for the worker.

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. The facts of the case, which did not substantially change, supported an employee-employer relationship. 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.

Based on the above analysis, we conclude that the firm had the right to exercise direction and control over the worker for the entire work relationship 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.