

SS-8 Determination—Determination for Public Inspection

Occupation

02SAL Salespersons

Determination:

☒ Employee

☐ Contractor

UILC

Third Party Communication:

☒ None

☐ 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 business of operating a retail shop selling tobacco products and smoking glass pipes. The worker was a salesperson. He received a 2017 Form 1099-MISC for his services and continued to work in 2018 as well. There was no written agreement.

The firm provided training/instructions for basic operation of the point of sale (POS) system, inventory control processes, cleaning, and information about other workers' jobs; however, the firm noted the worker needed no training as he had previous experience. The firm noted that the worker was the lead person and controlled how things ran (in the shop). Both parties agreed that the firm determined the methods by which the assignments were performed and would be contacted if any issues or problems arose. The worker submitted a list of his hours worked; the firm noted that he submitted a daily cash register report. The worker's daily routine was to arrive at the shop, clock-in, perform duties such as dealing with customers and cleaning the store, then clock-out. There were meetings every two weeks. The firm noted that the worker was to personally provide the services with only the firm hiring and paying any substitute workers.

Both the firm and the worker agreed that the firm provided the shop, all inventory, supplies and the POS system. Both parties agreed that the worker was paid an hourly rate along with a commission. The customer paid the firm. The worker did not establish the level of payment for services.

There were no benefits though the worker mentioned the firm providing snacks and drinks along with discounts on products. Both parties agreed that either party could terminate the relationship without incurring a liability. The worker did perform similar services for others. The relationship has ended.

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 operated a retail establishment and engaged the worker to supply the labor needed for its operations. The worker had previous experience in this line of work and therefore did not require extensive instructions. He worked scheduled hours performing various duties such as customer services, inventory, opening/closing the store, and managing other workers. 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. In addition, the worker's services for the firm were all performed at the firm's location, also a factor that suggests the firm's ability to retain control over the worker. While the worker's services were for a limited period of time, those services were continuous. 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.

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. It was the firm that had the investment in the shop, equipment, and inventory. The worker simply received an hourly rate of pay along with a commission and had no other economic risk other than the loss of this 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. The opportunity for higher earnings or of gain or loss from a commission arrangement is not considered profit or loss. Therefore, payment of a commission alone is not an indication of an independent contractor relationship.

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 were no benefits and there was no written agreement. The worker was engaged to provide labor for the firm's retail operation. When doing so, the worker was not engaged in a separate business venture. 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.