

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 business of selling lumber, doors, windows, etc. The worker was engaged as a salesperson, selling materials to contractors and homeowners. She received a Form 1099-MISC for her services in 2017; she continued to provide services in 2018 as well. The worker provided copies of pay check records showing withholdings were taken for about four months in 2018. There was no pay document of any kind provided by either party for 2018. There was no written agreement.

The firm provided training through its sales manager. The worker received her work assignments via phone calls, online chat services, emailed requests, and online mailbox. The firm's operations manager determined the methods by which the assignments were performed and would be contacted if any issues or problems arose. The worker submitted verbal notification reports. The worker worked set scheduled hours each work day at the firm's premises; the firm disagreed and indicated that the worker came and went as she pleased. There were meetings. The worker was required to provide the services personally with only the firm hiring and paying any substitute workers.

The firm provided the computer, desk, phone, and printer. The worker supplied some personal items though the firm indicated that she also supplied a computer as well. The firm reimbursed her for any office supplies needed. She was paid a commission and had no other economic risk. The customer paid the firm. The firm established the level of payment for services.

There were no benefits other than discounted insurance rates. Either party could terminate the relationship without incurring a liability. The worker did not perform similar services for others. She advertised via business cards, word of mouth, and social media. The relationship ended when the worker quit.

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. 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.

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 worker received training and instructions, even if just initially, from the sales manager as well as the operations manager. Training a worker by requiring an experienced employee to work with the worker, by corresponding with the worker, by requiring the worker to attend meetings, or by using other methods, indicates that the person or persons for whom the services are performed want the services performed in a particular method or manner. This is true even if the training was only given once at the beginning of the work relationship. There was some disagreement between the parties about whether the worker worked set scheduled hours. If the nature of the occupation makes fixed hours impractical, a requirement that workers be on the job at certain times is an element of control. Furthermore, the worker worked at the firm's location and was provided with a workspace. If the work is performed on the premises of the person or persons for whom the services are performed, that factor suggests control over the worker, especially if the work could be done elsewhere. Work done off the premises of the person or persons receiving the services, indicates some freedom from control. However, this fact by itself does not mean that the worker is not an employee.

In addition, the worker was required to personally provide the services on a continuous basis. This indicated that the firm was concerned about the methods used to perform her services as well as the results achieved. This element was supported by the fact that the firm trained the worker. The continuing relationship between the worker and the firm indicated 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. The worker was paid a commission and could make more or less dependent on her sales' activities. The opportunity for higher earnings or of gain or loss from a commission arrangement is not considered profit or loss. It was the firm that provided the workplace, workspace, furnishings, equipment and supplies. 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 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.

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. Undoubtedly, the worker's sales activities were necessary and integral to the firm's business activities. 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.

The firm had indicated that the worker knew that she would be receiving a Form 1099 and had no problem with that. However, 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. So even if two parties agree to an independent contractor relationship but that relationship is not supported by the facts, it cannot simply be established by agreement between the two parties.

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.

Please see Publication 4341 for guidance and instructions for firm compliance.