

SS-8 Determination—Determination for Public Inspection

Occupation 03CRA Construction/Technical Services/Trades	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 providing various construction services. The worker was engaged as a carpenter. There were no pay documents issued though the firm confirmed that the worker provided services to the firm as well as the amounts paid by a letter provided to the worker on November 7, 2016. There was no written agreement.

According to both parties, the firm provided verbal instructions as to how the work was to be done. Both parties agreed that the worker received verbal work assignments from the firm in the mornings. Each party indicated that the other determined the methods by which the assignments were performed but agreed that the firm would be contacted if any problems or issues arose. Only the worker mentioned keeping a notebook indicating where he spent his time and that he filled out a time card. The firm noted that the worker set his own hours; however, the worker noted that he reported to the office or to the job site in the mornings, worked and then returned to the office and delivered materials. Both parties agreed that the worker worked at customer residences. Only the worker mentioned morning staff meetings to receive his work assignments and report on his work progress. Both also agreed that the worker was required to provide the services personally with only the worker noting that the firm would hire/pay any substitute workers.

The firm noted that each party provided simple tools; however the worker noted that the firm provided the truck, trailer, supplies, tools, and saws. The worker supplied a nail apron, tape measure, pencils and hammer. The worker noted he was paid an hourly rate; however, the firm noted that the worker was paid piece work but did not provide any estimates or invoices from the worker. The firm indicated that the worker had no other economic risk other than the loss of his compensation; the worker indicated that he paid the firm for truck damages. Both parties agreed that the customer paid the firm. Each indicated that the other established the level of payment for services.

Both the firm and the worker agreed that there were no benefits though the worker mentioned a Christmas bonus in 2013. The relationship could be terminated by either party without incurring a liability. The worker did not perform similar services for others during the same time period though the firm indicated that he did. The worker noted that he was not responsible for soliciting new customers but to just do a good job, pass out the firm's business cards if asked, wear company shirts, and put up company signs. The firm's owner was responsible for sales and determined where the worker would work. The worker indicated that the work relationship ended when he 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. It was the firm that obtained the jobs and remained responsible to its customers. It bid on the work and engaged the worker to provide his services according to the firm's instructions and job requirements. While his hours may have varied and he worked only when needed, 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. It is unreasonable to assume that the worker could come and go as he pleased as his services were only part of the firm's customers' job. If a worker must perform services in the order or sequence set by the person or persons for whom the services are performed, that factor shows that the worker is not free to follow the worker's own patterns of work. Often, because of the nature of an occupation, the person or persons for whom the services are performed do not set the order of the services or set the order infrequently. However, if the person or persons retain the right to control the order or sequence of the work, this is sufficient to indicate an employer-employee relationship. In addition, the worker provided his services throughout the time period involved. 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 equipment, tools, and materials. 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. The firm indicated that the worker was paid piece work yet provided no evidence such as bids or invoices for services performed. The fact that the worker was paid when the work was completed could also be referring to an hourly rate of pay, as noted by the worker. Payment by the hour 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.

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 as a carpenter to provide his services when needed by the firm. When doing so, the worker was not engaged in an separate business enterprise. His services instead were part of the firm's continuing operations. 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 worker may have worked for others, if he only worked part-time for the firm. If a worker performs more than de minimis services for a multiple of unrelated persons or firms at the same time, that factor generally indicates that the worker is an independent contractor. See Rev. Rul. 70-572, 1970-2 C.B. 221. However, it is possible for a person to work for a number of people or firms concurrently and be an employee of one or all of them.

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.