

SS-8 Determination—Determination for Public Inspection

Occupation 03INS Installers	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

It is our usual practice in cases of this type to solicit information from both parties involved. Upon the submission of the Form SS-8 from the worker, we requested information from the firm concerning this work relationship. The firm responded to our request for completion of Form SS-8.

From the information provided the firm is an independent manufacturers' representative agency with their primary line of business being the selling of sensors and heaters. The firm states they have a requirement, at times, to install a small portion of the heaters systems for a few of their customers. In those cases, the firm states they employ an independent contractor to do such work. These individuals are paid hourly, reimbursed for mileage, and provided the job address. The firm states these individuals independently schedule their time, the tools necessary to do the work, and upon completion, invoice them their hours and mileage for the job at their discretion. The firm states the worker had been traveling for personal reasons and was not available to work for weeks on end, and they would try to email, phone, and text the worker without and response. The firm states the worker's contract was terminated and another contractor was brought in to replace him. The firm states that at no time were funds taken from the worker's invoices for taxes or anything else. The firm states the worker never asked to be an employee and it was never discussed. The firm states the worker filed invoices at his discretion and was paid in full.

A copy of an email dated March 4, 2017 from the firm to the worker was submitted for consideration in this case. This email states that it is an official offer of employment with [REDACTED]. It also states:

- o Starting wages of \$xx per hour would be paid to the worker with an expected \$5 raise every six (6) months.
- o Year end bonus – generally \$5k or more.
- o Benefits:
 - Paid tuition to any public college or university. Private schools will dollar match.
 - Would expect worker to continue an educational course of achievement. Recommended subject for better understanding of the (firm's) business: business; physics; psychology.
- o Medical benefits – can finance present policy or provide a new policy.
- o Mileage paid at IRS rate.
- o Required equipment – the firm would provide or fund any of the following items:
 - Computer desktop or laptop
 - Cellular Phone
 - Scanner/Printer
 - Installation tools (will provide you with a tool kit).
- o Start date: Monday March 6, 2017 – Two individuals from the firm's business can pick up the worker between 5:30 a.m. and 6:00 a.m. and go to the firm's client location together. The worker will report directly to a member of the firm's business.
- o Ask that the worker submit hours and expenses no more than once a week and no less than once a month to the firm. Worker will be paid within three (3) days electronically.
- o The worker is welcomed to the firm's team.

There was no evidence presented or found in this investigation that indicates the worker owned or operated his own business while performing services for the firm.

Analysis

As in this case and 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, the firm provided the worker with training and provided funding for the worker's training outside of their business. The worker was required to report to another of the firm's and they all worked at the firm's client's location. The worker provided his services on behalf of and under the firm's business name rather than an entity of his own. The firm was responsible for the quality of the work performed by the worker and for the satisfaction of their clients. This gave the firm the right to direct and control the worker and his services in order to protect their financial investment, their business reputation, and their relationship with their clients.

The firm's statement that the worker performed services on an as-needed basis and therefore, an independent contractor is without merit as both employees (seasonal) and independent contractors can perform services when the needs of a business warrants.

A continuing relationship was established rather than a one-time transaction taking place. A continuing relationship may exist where work is performed in frequently recurring although irregular intervals. The existence of a continuing relationship indicates an employer/employee relationship was established.

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 firm provided the worker with all materials, tools, and equipment to the worker in order to perform his services. The firm reimbursed the worker for any tool or mileage expense incurred by the worker. The worker, therefore, did not have an opportunity to incur a loss as a result of his services. "Profit or loss" implies the use of capital by a person in an independent business of his or her own. The risk that a worker will not receive payment for his or her services, however, is common to both independent contractors and employees and, thus, does not constitute a sufficient economic risk to support treatment as an independent contractor. If a worker loses payment from the firm's customer for poor work, the firm shares the risk of such loss. Control of the firm over the worker would be necessary in order to reduce the risk of financial loss to the firm. The opportunity for higher earnings or of gain or loss from a commission arrangement is not considered profit or loss.

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

The firm's offer to the worker at the beginning of the work relationship outlines the worker's hourly rate of compensation, his eligibility for medical benefits, a yearly bonus, mileage reimbursement, and the providing of or funding of equipment such as a computer, telephone, printer/scanner, and tools. The relationship between the firm and worker was expected to be a continuing relationship rather than a one-time transaction taking place.

If a firm has to make a worker "understand" or "agree to" being an independent contractor (as in a verbal or written agreement or the filing of a Form W-9), then the worker is not an independent contractor. An individual knows they are in business for themselves offering their services to the public and does not need to be made aware of, understand, or agree to be an independent contractor.

Section 31.3121(d)-1(a)(3) of the regulations provides that if the relationship of an employer and employee exists, the designation or description of the parties as anything other than that of employer and employee is immaterial. Thus, if an employer-employee relationship exists, any contractual designation of the employee as a partner, co-adventurer, agent, or independent contractor must be disregarded.

Therefore, the firm's 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.

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.