

SS-8 Determination—Determination for Public Inspection

Occupation 03MIS Laborer	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 operating a construction company. The worker was engaged to provide construction labor. He received a 2017 1099-MISC for his services. There was no written agreement.

Both the firm and the worker agreed that the worker did not receive any training. The worker noted that he was given his job assignment at the beginning of each shift. However, the firm noted that he was given architectural plans to follow. Only the worker noted that the firm's supervisor determined the methods by which the assignments were performed and would be contacted if any issue or problems arose. The worker submitted timesheets. His daily work routine was to work according to set scheduled hours, performing the tasks that he was assigned at the job site. The firm, however, indicated that the worker determined his own work schedule at the work site. There were meetings to attend; the firm disagreed. Both parties agreed that the worker was required to provide the services personally. But then the firm added that the worker would hire and pay any substitute workers.

According to the worker, the firm provided all the equipment. However, the firm noted that it only provided the plans, and that the worker supplied and operated heavy equipment as well as tools. Both parties agreed that the worker was paid by the hour and had no other economic risk. The customer paid the firm. Each party indicated that the other established the level of payment for services.

Both the firm and the worker agreed that there were no benefits. While the worker noted that either party could terminate the relationship without incurring a liability; the firm disagreed but offered no explanation. The worker did not perform similar services for others; the firm disagreed. 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 obtained the construction jobs and remained responsible to its customers. The worker was engaged by the firm who provided no evidence that the worker bid on the work that he did. While there was disagreement over whether the worker scheduled his own hours or the firm scheduled the 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. It would be reasonable to assume, that if the worker received his task assignments daily from a supervisor, he performed the services in the order or sequence set by the firm. 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. The worker provided his services to the firm for a brief period of time but on a continuous basis, submitting a timesheet. 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. The worker had no significant investment and therefore, no risk. While the firm indicated that the worker supplied/operated heavy equipment, the worker's compensation only reflected nonemployee compensation and not any 'rent' paid for supplying heavy equipment. 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. In addition, the worker was paid an hourly rate. 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.

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 no written agreement. The worker was engaged to provide the necessary labor for the firm's construction business. When doing so, the worker was not engaged in a separate business venture. He had no business presence, did not advertise, or hold himself out to the public. 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.