

SS-8 Determination—Determination for Public Inspection

Occupation 03PVW Photography/Video Workers	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 film production company. The worker was engaged as the 1st Assistant Camera. He received a 2017 Form 1099-MISC for his services. There was a written agreement.

Both the firm and the worker agreed that the firm provided no training. The worker received his work assignment from the call sheet, given the day before by the firm. Both parties agreed that the firm's department head determined the methods by which the assignments were performed and would be contacted if any problems or issues arose. There were no required reports. The worker's work hours were different every day, determined by the call sheet. He cleaned camera equipment, built camera equipment, kept camera powered on and ready to use, kept camera in focus, and broke down the camera equipment to store at the end of the day. The firm noted that on shoot days, the worker worked 12 hours at the production location.. There were no meetings. Both the firm and the worker agreed that the worker was required to provide the services personally.

Both the firm and the worker agreed that the firm provided all the camera equipment. The worker was paid by the hour and had no other economic risk. The firm added that the worker was guaranteed a 12 hour day. The firm established the level of payment for services. The firm also carried workers' compensation insurance on the worker.

Both the firm and the worker agreed that there were no benefits and that either party could terminate the relationship without incurring a liability. The worker did not perform similar services for others during the same time period. The relationship ended when the job was completed.

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 was a professional and required no training as a cameraman. The firm engaged him for his experience and skills. However, he was told what to do, when to perform his services and where to perform those services. 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 worked twelve hours a day during the brief period of time that he spent working for the firm. If the worker must devote substantially full-time to the business of the person or persons for whom the services are performed, such person or persons have control over the amount of time the worker spends working and, therefore, the worker is restricted from doing other gainful work.

The worker was required to provide the services personally. This was understandable as the worker was hired based on his experience and skills. If the services must be rendered personally, presumably the person or persons for whom the services are performed are interested in the methods used to accomplish the work as well as in the results.

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 investment in a business. He received an hourly rate of pay and was guaranteed a minimum amount. He had no other economic risk other than the loss of that 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. 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. Also, workers are assumed to be employees if they are guaranteed a minimum salary.

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 a written agreement. However, the firm's belief 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.

The worker was engaged to provide his services as a cameraman for the firm's film production activities. When doing so, the worker was not engaged in a separate business venture. The fact that his services were for a limited time period, did not by itself, make him self-employed. 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 performing similar services during the year. 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. 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.

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