

SS-8 Determination—Determination for Public Inspection

Occupation 03TRA Construction 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 providing general contracting services. The worker was engaged as a day laborer providing general labor for demolition and construction. He received a 2017 1099-MISC for his service. There was no written agreement.

The firm indicated that there was no training; however, the worker noted that he received on-the-job training related to demolition and construction. The firm assigned him tasks daily. Each party indicated that the other determined the methods by which the assignments were performed; both agreed that the firm would resolve any issues. There was no required reporting. The worker generally worked set scheduled hours and days, but those could be changed depending on the firm's needs. However, the firm noted that the worker came and went when he pleased. All services were at the firm's job site. Both parties agreed that the worker was required to provide the services personally.

The firm noted that it provided the supplies and that the worker provided the tools. Both parties agreed that the worker was paid a daily rate and had no other economic risk. The firm noted that the customer paid the worker. The worker did not establish the level of payment for services; the firm disagreed.

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. He received several company logo T-shirts. The relationship ended when the job was completed; the worker noted that he was fired. .

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 work/jobs and engaged the worker as a laborer. Based on the facts of the case, the worker had limited experience and likely received instructions/on-the-job training. It is unreasonable to assume that a worker who was hired and paid per day, came and went off the job site whenever they chose as well as the fact that the customer paid the worker. The worker may have had a flexible work schedule; however, 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. The worker was to provide the services personally indicating that the firm was interested in the methods used to accomplish the work as well as in the results. While the worker's services were for a short period of time, 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. While the worker may have provided some small tools, these would not be considered a significant investment. 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. The worker received a daily rate of pay and had no other economic risk.

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 day laborer for the firm's contracting business. When doing so, the worker was not engaged in an separate business venture. His services were part of the firm's 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 firm indicated that the worker was hired as an independent contractor. 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, the two parties cannot simply agree that the worker was an independent contractor when the facts do not support that type of work relationship.

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.