

SS-8 Determination—Determination for Public Inspection

Occupation 04MAN Sales Manager	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 marketing and selling retail gas and energy services to consumers. The worker was a salesperson who sold those services over the phone. She received a 2017 Form 1099-MISC for her services. There was no written agreement.

Both the firm and the worker agreed that the firm provided no training. Both also agreed that the firm provided the worker with her work assignments by providing a sales lead list (to call). Each party indicated that the other determined the methods by which the assignments were performed. Only the worker indicated that the firm would be contacted if any issues or problems arose. Only the worker noted that detailed information of customer and customers' files were given to the firm. The worker's routine consisted of working weekdays; she printed daily reports and pricing as well as supervised other workers and helped them if necessary. The firm noted that she could come and go when she pleased. Both parties agreed that she worked at the firm's location. Only the worker mentioned staff meetings. The firm indicated that the worker was to provide the services personally and both agreed that the worker could not hire substitutes.

Both the firm and the worker agreed that the firm provided a workstation, materials, supplies, phone, computer, furnishings, and equipment needed by the worker to perform her services. Both parties agreed that the worker received commission with a guaranteed minimum; the worker had no other economic risk. The customer paid the firm and the firm established the level of payment for services.

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. The worker was responsible for calling and making sales with the firm providing most leads. The worker reported the leads into the computer system. She had a call quota to fulfill each week, and a minimum number of hours to work per week. The firm determined the worker's territory. The worker sold energy products at the firm's location. 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.

There are significant similarities between this case and Revenue Ruling 74-333. In that ruled case, a worker who was engaged by a company to solicit orders by telephone from designated individuals and institutions, was furnished office facilities, expected to work 4-8 hours a day and was paid commission on each sale was an employee for Federal employment tax purposes.

In this instant 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 engaged by the firm as a telephone solicitor who made sales over the phone from leads furnished by the firm. The firm indicated that the worker set her own schedule but that was not necessarily an indication that she came and left whenever she wanted. A work schedule may be based on accommodating a worker and her availability but still have set scheduled hours. The establishment of set hours of work by the person or persons for whom the services are performed is a factor indicating control; 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 indicated that she clocked-in and that there was a minimum amount of hours required weekly. As the job entailed phone calling, it is reasonable to assume that there were optimum times to make the calls as well. The worker provided her services at the firm's premises, also another indication of the firm's ability to direct and control the worker's behavior. If the work is performed on the premises of the person or persons for whom the services are performed, that factor suggests control over the worker, especially if the work could be done elsewhere. In addition, for the time period involved, the worker provided her services on a continuous basis. 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 firm provided the workplace and workspace along with all equipment, supplies and materials needed by the worker to provide her services. The worker had no investment and therefore no risk. 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. Although the worker was paid a commission, there was a guaranteed minimum. The opportunity for higher earnings or of gain or loss from a commission arrangement would not be considered profit or loss and, in addition, the guaranteed minimum compensation/salary supported a finding of an employer-employee relationship.

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 firm sells and markets energy products. The worker's services as a telephone salesperson would be essential and integral to its continuing operations. When doing so, the worker was not engaged in an separate business venture. 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.