

SS-8 Determination—Determination for Public Inspection

Occupation 05CSI Companion Sitters	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 home health care services. The worker was engaged as a companion who helped clients with daily living activities. She received a 2017 Form 1099-MISC for her services. There was no written agreement between the worker and the firm.

Both the firm and the worker agreed that the worker filled out an application. The firm would be contacted by a client requiring health care services. The worker's references would be checked by the firm. The firm also assessed and evaluated the client's needs prior to matching the client with the worker. The firm indicated that it provided instructions to the worker on what to wear and how to behave as a professional. Both parties agreed that the worker received her assignments via phone calls from the firm. There was disagreement on who determined the methods by which the assignments were performed; but both parties agreed that the firm would be contacted if any issues or problems arose. The worker filled out daily patient paperwork and turned it in to the firm weekly. The worker's work routine was to get the patient out of bed, shower, daily physical therapy, etc. She worked set scheduled hours that might have fluctuated, and worked at the client's location. Both parties agreed that the worker was to provide her services personally with only the firm hiring and paying others.

The firm noted that it provided badges; the worker noted that timesheets and daily therapy paperwork were also provided. Both parties agreed that the worker was paid an hourly rate on a weekly basis; she had no other economic risk. The customer paid the firm. The worker did not establish the level of payment for services.

The worker noted that there were paid holidays, but no other benefits. Both parties agreed that either party could terminate the relationship without incurring a liability. Both also agreed that the worker did not perform similar services for others. The relationship ended when the worker quit.

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 clients and engaged the worker to provide her services under the name of the firm, matching the worker with a client. She worked set scheduled hours, based on her availability. The firm noted that the worker and the client could mutually agree to change the worker's hourly schedule. However, the worker still submitted weekly paperwork to the firm and the firm still billed for all adjusted hours, again supporting the firm's continued control even with fluctuating 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. 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. While the worker's services were for a limited time period, those services were continuous. 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 other economic risk other than the loss of her hourly rate of pay. The worker received her compensation weekly, whether or not the firm was paid by the client thereby eliminating any risk. 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 was no written agreement. The worker was engaged to provide services for the firm's home health care business. When doing so, the worker was not engaged in a 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.

The firm indicated that it informed the worker that she would be receiving a Form 1099-MISC for her services; however, that did not make the worker self-employed. 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. Therefore, even if the worker agreed to receive a Form 1099 for her services, that would not make her an independent contractor when the facts support an employer-employee 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.