

SS-8 Determination—Determination for Public Inspection

Occupation Personal Service Providers	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 gym. The worker was engaged as a certified personal trainer who performed front desk services as well as cleaned the gym. He received a Form 1099-MISC for his services in 2017 and 2018. There was no written agreement.

According to the worker, the firm provided instructions on how to use the firm's computer and software for managing classes, booking new client sessions, managing membership, and processing client payments. Evidence was provided showing that he was granted access to the firm's system. In addition, he was taught to teach a class, what exercises to use, how to use the firm's sound system, what cleaning tasks to perform such as laundry or mopping, how to open/close gym and how to fill out the firm's 'workout log' templates. The firm, however, noted that there was no training or instructions and that the worker created his own schedule and hours. He received his work assignments during staff meetings or any other time. Each party indicated that the other determined the methods by which the assignments were performed. Both parties agreed that the firm would be contacted if any issues or problems arose. The worker submitted written workout logs, verbal reports on a daily basis, written client follow-ups and cleaning to-do lists, both written and verbal. Examples of the workout logs were provided though the firm indicated that there were no reports. The worker's daily routine changed from day-to-day; he reported to work when told and would be given his weekly schedule. He always tried to book personal training clients' sessions right before or after his scheduled hourly work. He only performed services for the firm at the firm's gym.. He also attended staff meetings. Both parties agreed that the worker was required to perform the services personally.

The firm provided the gym, gym equipment, office equipment, cleaning products, gym supplies, and sound system. The firm indicated that the worker paid a portion of his client fees for the use of the firm; however, there was no evidence regarding this arrangement. Both parties agreed that the worker was paid an hourly rate and had no other economic risk. He was paid a commission for his personal training services for the firm's clients. The customer paid the firm. The firm retained their part of the commission arrangement before compensating the worker. The firm established the level of payment for services and posted various packaged services with discounts. However, the firm added that the worker could set his own personal training fee.

Both the firm and the worker agreed that there were no benefits. Either party could terminate the relationship without incurring a liability though the worker noted the firm owed him pay. The firm noted that the worker did perform similar services for others. The worker did not advertise; the firm provided him with their business card with his name, a gym uniform, and used the worker's image to advertise its firm. The worker would give potential customers a walk through of the facility. If the firm provided a client to the worker, he was required to give them a free personal training session. The worker informed the firm about potential clients and whether they signed up for services from the firm. All monies were paid to the firm. The worker provided personal training or fitness classes individually or in packages at the firm's gym. 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. 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 firm operated a gym offering fitness classes and personal trainers to its clientele. The worker was engaged to provide his services, teaching classes and providing personal training sessions as well as other gym duties as assigned. While the worker had experience in this line of work, it would be unreasonable to assume that he received no instructions regarding procedures and protocols at the firm's gym as he performed front desk duties as needed. The worker informed the firm of his availability to work and the firm scheduled his services accordingly. Usually, the establishment of set hours of work by the person or persons for whom the services are performed is a factor indicating control. 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. In addition, the worker's services for the firm were all performed at the firm's location, also a factor that suggests the firm's ability to retain control over the worker. The worker's services for the firm were for a limited period of time, however, those services were continuous and he was required to provide the services personally. 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. In addition, 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. Understandable, as the worker's performance was a reflection of the gym's operation.

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. It was the firm that had the investment in the gym, equipment, computer and other needed materials. The worker was paid an hourly rate and a commission, dependent on the type of services he was performing. He had no other economic risk other than 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. Regarding the commission arrangement, if a worker loses payment from the firm's customer for poor work, the firm shares the risk of such loss. Control of the firm over the worker would be necessary in order to reduce the risk of financial loss to the firm. The opportunity for higher earnings or of gain or loss from a commission arrangement is not considered profit or loss.

It is acknowledged that the firm indicated that their share of the commission arrangement covered the leasing of the facility and equipment to the worker; however there was no agreement outlining this arrangement. In addition, the rental fee would need to be a set amount, enabling the worker to incur a profit or loss dependent on the success of his own activities.

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 to provide labor needed for the firm's gym operation. 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.

It is acknowledged that the worker may have worked for others. Many employees work more than one job, but that fact alone does not make them self-employed. 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.