

SS-8 Determination—Determination for Public Inspection

Occupation 05ITE Instructor/Teacher	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

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Facts of Case

The firm is a charter school. The worker was initially engaged as a member of an intervention program management staff and then stayed on as a tutor and substitute teacher. She received a Form 1099-MISC for her services in 2012 as well as in 2011 and 2013. There was no written agreement.

Both the school and the worker agreed that there was specific training for the program involving the worker. Both parties also agreed that the firm provided the work assignments by contacting the worker and that the school (via administrators) determined the methods by which the assignments were performed. The firm's principal would be contacted if any issues arose. The only required reports submitted were student rolls and logs (time). The worker's work routine varied, sometimes four to six hours a day either at the school or at a mental health facility to see a student. The school agreed indicating that the tutoring was performed both on and off site: off-site in the mornings and on-site in the afternoons during regular school hours at youth group homes, student's homes and the school campus. There were staff meetings; the worker was not always required to attend and would be paid if she did attend. Both agreed that the worker was required to provide the services personally.

The firm provided everything according to the worker; the firm noted that it provided access to students and basic school supplies. The worker did provide some teacher materials and transportation costs. The off-site group homes also provided classroom space. The firm reimbursed the worker for fuel and mileage. Both parties agreed that the worker was paid by the hour and had no other economic risk. The worker did not establish 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 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 degree of importance of each factor varies depending on the occupation and the context in which the services are performed.

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/students and the worker performed her services according to the firm's scheduled work hours and days. The firm advertised its offerings and available services as well as its schedule and tuition fees. The worker prepared her own class agenda and did not require direct supervision. Often the skill level or location of work of a highly trained professional makes it difficult or impossible for the firm to directly supervise the services so the control over the worker by the firm is more general. Factors such as integration into the firm's organization, the nature of the relationship and the method of pay, and the authority of the firm to require compliance with its policies are the controlling factors. Yet despite the absence of direct control, it cannot be doubted that many professionals are employees.

The worker provided her services at the firm's location. 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; this element supported an employer-employee finding. In fact, the firm directed its clients to the worker's services and class when warranted. In addition, the worker provided her services on a continuous basis throughout the time period involved. 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. Though there was disagreement on how the worker was compensated, the worker had no other economic risk other than loss of that compensation as she did not have an investment in the firm. The worker did not pay set rental fee to use the firm's facilities, equipment or supplies. A person who can realize a profit or suffer a loss as a result of his or her services is generally an independent contractor, while the person who cannot is an employee. "Profit or loss" implies the use of capital by a person in an independent business of his or her own. The risk that a worker will not receive payment for his or her services, however, is common to both independent contractors and employees and, thus, does not constitute a sufficient economic risk to support treatment as an independent contractor. 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.

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 to show intent. Though the firm mentioned a partnership relationship, there was no evidence of that between the two parties. The worker was an educator/counselor at the firm's place of business. She was not engaged in an independent enterprise; she did not advertise, maintain a separate place of business, or hold herself out to the public. Instead, the services performed by the worker were part of the necessary activities of the firm's home schooling support 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.

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.