

SS-8 Determination—Determination for Public Inspection

Occupation 05PHC Pet Handlers/Caregivers	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 worker submitted a request for a determination of worker status in regard to services performed for the firm from May 2017 to July 2017 as a dog groomer. The work done by the worker included answering phones, making appointments, cleaning, assisting customers, balancing the firm's cash drawer, in addition to washing and grooming dogs. The firm issued the worker Form 1099-MISC for the year in question. The worker filed Form SS-8 as she believes she erroneously received Form 1099-MISC.

The firm's response states its business is dog grooming. The worker was engaged as a dog groomer. The worker was classified as an independent contractor as she set her own schedule and prices for services, bought her own supplies, took money from customers, and booked appointments. The firm did not tell the worker when or how to work. Services were performed under a verbal agreement.

The firm stated that as the worker had prior training and experience, it did not provide specific training or instruction to the worker. The worker chose the days she worked and booked appointments. The worker and the customer determined the methods by which assignments were performed. The worker and customer could handle problems or complaints themselves or the firm could be contacted. The firm required the worker to document what was done to the animal. The worker's routine varied based on her availability. She came in to groom dogs, cleaned up after herself, and left for the day. Services were performed at the firm's premises. Meetings were not required. The firm required the worker to personally perform services. Hiring and paying substitutes or helpers was not applicable. The worker stated the firm provided specific instructions on how to do the work. The firm provided work assignments, determined the methods by which assignments were performed, and assumed responsibility for problem resolution. Her daily routine consisting of arriving at 8 am, working on dogs until 3pm, and then waiting until the last dog left, even if she was already done grooming dogs for the day. She typically worked five-days per week. The firm was responsible for hiring and paying substitutes or helpers.

The firm stated it provided the table, dryers, and tub. The worker provided all grooming equipment and supplies. The worker did not lease equipment, space, or a facility. The worker incurred the expense of equipment upkeep such as blade and scissor sharpening. Customers paid the worker. The firm paid the worker commission. The firm guaranteed the worker 50% of each customer fee. A drawing account for advances was not allowed. The firm did not carry workers' compensation insurance on the worker. The worker was required to carry her own workers' compensation. The worker established the level of payment for the services provided. The worker stated the firm provided customers, tables, tubs, shampoos, conditioners, dryers, bows, bandannas, ear cleaner, cotton balls, and the appointment book. She provided her grooming equipment. Customers provided the dogs. Whether by check, credit card, or cash, customers paid the firm. The firm established the level of payment for the services provided and set the minimum price per service charged to customers.

Benefits were not made available to the worker. The work relationship could be terminated by either party without liability or penalty. The firm stated it is unknown if the worker performed similar services for others. The firm's approval was not required for the worker to have done so. There was no agreement prohibiting competition between the parties. It is unknown if the worker advertised. The firm represented the worker as a contractor to its customers. Services were performed under the firm's business name. The work relationship ended when the worker was no longer needed. It was a temporary two-month work relationship in which the worker worked 32 days. The worker stated she did not perform similar services for others or advertise. She could groom outside of the firm, if the customer had never been to the firm before. The firm represented her as an employee to its customers. The work relationship ended because of no dogs/fired.

Analysis

Generally, the relationship of employer and employee exists when the person for whom the services are performed has the right to control and direct the individual who performs the services, not only as to what is to be done, but also how it is to be done. It is not necessary that the employer actually direct or control the individual, it is sufficient if he or she has the right to do so.

Section 31.3121(d)-1(a)(3) of the regulations provides that if the relationship of an employer and employee exists, the designation or description of the parties as anything other than that of employer and employee is immaterial. Thus, if an employer-employee relationship exists, any contractual designation of the employee as a partner, coadventurer, agent, or independent contractor must be disregarded.

Therefore, the firm's statement that the worker was an independent contractor pursuant to a verbal agreement is without merit. For federal employment tax purposes, it is the actual working relationship that is controlling and not the terms of the contract (oral or written) between the parties. Furthermore, whether there is an employment relationship is a question of fact and not subject to negotiation between the parties.

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. In this case, the firm required the worker to personally perform services. Furthermore, the services performed by the worker were integral to the firm's business operation. The firm provided work assignments by virtue of the customers served, required the worker to report on daily transactions, and ultimately assumed responsibility for problem resolution. These facts evidence the firm retained the right to direct and control the worker to the extent necessary to ensure satisfactory job performance in a manner acceptable to the firm. Based on the worker's past work experience and work ethic the firm may not have needed to frequently exercise its right to direct and control the worker; however, the facts evidence the firm retained the right to do so if needed.

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. In this case, the worker did not invest capital or assume business risks. 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. Based on the commission rate of pay arrangement the worker could not realize a profit or incur a 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. In this case, the worker was not engaged in an independent enterprise, but rather the services performed by the worker were a necessary and integral part of the firm's business. Both parties retained the right to terminate the work relationship at any time without incurring a liability. There is no evidence to suggest the worker performed similar services for others as an independent contractor or advertised business services to the general public during the term of this work relationship. The classification of a worker as an independent contractor should not be based primarily on the fact that a worker's services may be used on a temporary, part-time, or as-needed basis. As noted above, common law factors are considered when examining the worker classification issue.

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.

The firm can obtain additional information related to worker classification online at www.irs.gov; Publication 4341.