

SS-8 Determination—Determination for Public Inspection

Occupation 05PRW Public Relations Workers	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 shuttle and concierge services, city tours, guided adventures, and ebike rentals; it also operates a retail and art gallery space as well as provides hotel rentals. The worker was engaged as a local tour guide. She received a 2017 Form 1099-MISC for her services and continued to work in 2018 as well. There was no written, signed, or dated agreement.

The firm provided on-the-job training via a ride-along for the worker on a few tours. The firm noted that the worker's instructions were to give the guests a quality tour and to observe safety/driving laws. The firm gave the worker her work assignments based on the worker's availability, services requested, and vehicles available. The tours were generated by reservation or by the worker's self-promotion. The worker noted that she handed out flyers, asked for reviews, drove around in the golf cart and spoke with tourists. Each party indicated that the other determined the methods by which the assignments were performed. The worker noted that the firm would be contacted if any issues or problems arose; the firm indicated that the director of operations at the hotel office front desk would be contacted. There were no required reports. The worker's work schedule varied; her work entailed guiding a tour along a route. The firm agreed that the worker was to perform customized guided tours via their golf cart based on guests' requests with the worker choosing how often, when, and which route to choose. She would work briefly at the meet and greet location with the rest of her time spent on the tour route. There were required meetings to attend. The worker noted that she was to provide the services personally with only the firm hiring and paying any substitutes. The firm noted that the worker could hire others, pay them and then get reimbursed by the director of operations.

The firm provided the meeting place for guests as well as the vehicles used; the worker supplied all information for the tour as well as all promotional materials. The worker added that the firm also provided the fuel, maintenance costs, insurance and registration for the vehicle. She was paid a commission per activity which was a set amount per person but with a minimum as well as a maximum per (tour) activity. The customer paid the firm as well as the worker who would turn over the full amount to the firm. Both parties agreed that the worker did not establish the level of payment for services as the firm did.

Both the firm and the worker agreed that there were no benefits. According to the worker, either party could terminate the relationship without incurring a liability. The firm noted that the worker would not be paid unless she completed all the activities that she committed to. The firm provided leads; the firm included the worker did as well. Prices were fixed by the firm. The firm noted that all tours were submitted to and approved by the firm. The worker could 'sell' the services throughout the city as she self-promoted locally guided golf cart and shuttle services. The worker did not perform similar services for others; the firm disagreed. The firm noted that she was listed as a local tour guide on her social media page. 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 promoted its tour operation and engaged the worker as a local tour guide. The worker was initially provided with some training and instructions as well as evaluated for her knowledge of the local area. Training a worker by requiring an experienced employee to work with the worker, by corresponding with the worker, by requiring the worker to attend meetings, or by using other methods, indicates that the person or persons for whom the services are performed want the services performed in a particular method or manner. While the worker's work schedule varied based on her availability and client requests for tours, 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. This would be the case as the worker informed the firm about her availability to work. Undoubtedly, the worker had considerable latitude in the actual performance of her services, as the firm could not directly supervise her activities. However, the firm's clients evidently could/would give reviews/feedback about the guided tour experience. The worker performed her services under the name of the firm's tour operations. While the worker's services were for a brief period of time, they were continuous and not just a one-time occurrence. 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 had the investment in the golf cart that the worker used to provide her services. The firm incurred the maintenance and operating expenses of the vehicle. The worker did not pay to rent or lease the vehicle. She received commission that was a per person (tour guest) rate of pay; however, there was a minimum payment established as well as a maximum amount as well. The worker had no other economic risk other than the loss of that compensation. Profit or loss" implies the use of capital by a person in an independent business of his or her own. 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 no written agreement in effect. Please note that a written agreement, while showing the intent of the parties, would not alone be determinative of the actual work relationship if not supported by the facts. The worker was engaged to drive the firm's vehicle and provide a guided tour experience to the firm's clients. 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.