

SS-8 Determination—Determination for Public Inspection

Occupation 08PEN Performers/Entertainers	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 in business as a bar/nightclub. The worker was engaged by the firm to provide DJ services. The firm reported the worker's remuneration on Forms 1099-MISC for 2015 and 2016.

Information from the parties supports that the firm relied upon the worker's prior training and experience to perform his services. It only instructed the worker to play music that its customers liked. The firm stated that the worker was given the opportunity to select the nights in which he wanted to do performances. If problems or complaints occurred, the worker contacted the firm for resolution. The worker performed services from 9 p.m. – 2 a.m. He performed his services on the firm's premises.

The firm provided the sound equipment and the property. The worker provided his own DJ equipment: mixer turntable/CD and music material. The firm paid the worker a lump sum per night. Neither party indicated an investment by the worker in the firm or a related business, or the risk of the worker incurring a financial loss beyond the normal loss of compensation.

The firm did not make benefits available to the worker. The firm did not prohibit the worker from performing similar services for others during the same time period. There is no evidence submitted showing the worker advertised his services or maintained a business listing.

Analysis

Factors that illustrate whether there was a right to control how a worker performed a task include training and instructions. In this case, while the firm relied upon the worker's prior training and experience to perform his services, it was responsible for resolving any problems or complaints that may have occurred, showing it retained the right to change the worker's methods and to direct the worker to the extent necessary to protect its financial investment and ensure its customers' satisfaction. The worker performed his services according to the firm's business hours. A requirement that workers be on the job at certain times is an element of control. These facts show that the firm retained behavioral control over the services of the worker.

Factors that illustrate whether there was 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 firm was responsible for attracting customers, advertising, business decisions, maintenance, and inventory. 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. "Profit or loss" implies the use of capital by a person in an independent business of his or her own. Although the worker furnished his own DJ equipment, 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. The firm paid the worker at a nightly rate, and the risk of loss was absent. These facts show that the firm retained control over the financial aspects of the worker's services.

Factors that illustrate how the parties perceived 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 were part of the service recipient's regular business activities. In this case, the worker performed his services on a continuing basis. The worker was not engaged in an independent enterprise, but rather the DJ services performed by the worker were a necessary and integral part of the firm's business. 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 worker could have performed similar services for others during the same time period; 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. These facts show that the firm retained control over the work relationship and services of the worker.

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.