

SS-8 Determination—Determination for Public Inspection

Occupation 02COL Collector	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 collection agency. The worker was engaged as a collector. She received a Form 2017 1099-MISC as well as a 2017 Form W-2. According to the firm, it lost a client early in the year and laid off all employees due to lack of business. Former employees who stayed became independent contractors. There was no written agreement.

When engaged as an employee, the firm gave the worker a computer, phone, and collection procedure instructions. Therefore, she was experienced and trained when re-engaged as an independent contractor. She received her assignments via the firm's computer system. The firm noted, however, that no work was assigned and that she could pick and choose her work. Both parties agreed that the firm would be contacted if any issues or problems arose as it was the firm that remained responsible to the client. The worker submitted reports of monies collected, and hours worked by punching in and signing onto the computer/phone system. The worker filled out a schedule sheet for each week of her hours, even if her schedule was based on her availability. Both parties agreed that all her services were performed at the firm's premises. There were some random meetings. Each party indicated that the other could hire and pay any substitutes, but that apparently did not happen.

Both the firm and the worker agreed that the firm provided the office space, computer, phones, lunchroom, and furnishings. The firm noted that the worker provided office supplies. Both parties agreed that the worker was paid an hourly rate as a guaranteed minimum, or a commission, and had no other economic risk. The customer paid the firm with the firm noting that the payment processing company deposits the funds into a trust account with those funds split between the worker, firm and client. The worker did not establish the level of payment for services. The firm noted that the worker established any payment plan with the debtor; any commission was established by the firm's client. The worker could choose not to work for a particular client.

Both the firm and the worker parties agreed that either party could terminate the relationship without incurring a liability; however the worker would lose any commission owed if she quit. The worker did not 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. 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 initially engaged the worker as an employee, then changed her treatment to that of an independent contractor. The fact that the firm's clientele workload was no longer abundant did not make the worker self-employed. The firm noted that the worker chose her own work, and split commissions in lieu of rent; this fact also did not establish a business presence for the worker. As she was previously engaged by the firm, she had experience and training. It is not unreasonable to assume based on the circumstances, that the worker was given some latitude in her work and work schedule. The worker reported her hours in order to establish a minimum pay rate. The establishment of set hours of work by the person or persons for whom the services are performed is a factor indicating control. However, 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 were continuous, whether she worked many hours or just a few. 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 office, equipment, and tools. The worker received either an hourly rate of pay or commission, whichever was more. The opportunity for higher earnings or of gain or loss from a commission arrangement is not considered profit or loss. Also, splitting the fees collected to cover rental expenses did not establish a lease arrangement with the worker on which to incur a profit or loss. Essentially she was guaranteed an hourly rate of pay and 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. Also, workers are assumed to be employees if they are guaranteed a minimum salary.

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 was no written agreement. The worker continued her collection services for the firm's collection agency. When doing so, the worker was not engaged in an separate business venture. The fact that some elements changed in the work relationship also did not establish a business presence for the worker. Her services remained essential and integral to the firm's business activities. 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.