

SS-8 Determination—Determination for Public Inspection

Occupation 02OFF Office 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 selling online supplements. The worker was engaged as a virtual assistant and filled out an application to obtain the job. She provided her services on an as-needed basis including answering emails and phone calls from customers as well as completing various tasks as assigned. She received a Form 1099-MISC for her services in 2015 and 2016; she continued to provide services in 2017 as well. There was no written agreement provided.

The worker was provided with training involving customer service, website, FDA, marketing, and how-to-pay affiliates. The firm indicated that the worker was offered product training but refused. Both parties agreed that the firm assigned the work via emails, texts or verbal communications; also by the worker signing into the firm email to respond to (customer) emails as they came in. Each party indicated that the other would determine the methods by which the assignments were performed. Each also indicated that the other was responsible for dealing with any issues or problems that arose. Only the worker mentioned that she submitted reports such as payment logs, supplement order logs, refund logs, complaint logs, and adverse reaction reports. The worker's daily routine consisted of customer service work and other tasks on a daily basis, starting in the morning and sometimes to midnight, if necessary or required by the firm. However the firm indicated that the worker had no set schedule; she invoiced for total hours only. Both parties agreed that the worker worked from her own home office. According to the worker, there were staff meetings and weekly training meetings which she was expected to attend. Only the worker noted that she was to provide the services personally and that the firm would hire and pay any substitute workers. The firm disagreed and indicated the worker could hire and pay others though this did not occur.

The worker noted that the firm provided various office supplies, labels, envelopes, stationary, postage, etc. along with company phones for three customer service reps; she provided a personal computer. The firm disagreed and indicated that they provided nothing. Both parties agreed that the worker was paid an hourly rate. The worker noted that she had no other economic risk; however, the firm noted that she could damage her computer. Only the worker noted that the firm established 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 or penalty. The worker did not provide similar services for others and indicated that there was a non-compete agreement. The firm noted that the worker was represented as the firm's assistant. Both parties indicated that the work relationship had 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. While the worker may not have received any extensive training or instructions, she worked under the supervision of the firm. 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. This is true even if the training was only given once at the beginning of the work relationship. The worker filled out an application and was referred to as an assistant. She submitted various logs and reports pertaining to her activities. A requirement that the worker submit regular or written reports to the person or persons for whom the services are performed indicates a degree of control. Information was provided which illustrated the firm's direction of the worker's activities, understandable if she was an assistant.

It is acknowledged that the worker worked from home. Work done off the premises of the person or persons receiving the services, such as at the office of the worker, indicates some freedom from control. However, this fact by itself does not mean that the worker is not an employee. The importance of this factor depends on the nature of the service involved and the extent to which an employer generally would require that employees perform such services on the employer's premises. 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. The fact that she used her own computer would not qualify as a significant investment as many workers, both employees and self-employed, have personal computers. The worker received an hourly rate of pay and had no other economic risk other than the loss of her 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.

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, signed agreement.

The worker was engaged as an assistant who performed customer services as well as any other tasks assigned by the firm. When doing so, the worker was not engaged in an separate business venture. Her services instead were essential to the firm's continuing operations, even if those services were not performed at the firm's location. 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.

Please see Publication 4341 for guidance and instructions for firm compliance.