

SS-8 Determination—Determination for Public Inspection

Occupation 02SAL Salespersons	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 specialty lumber, doors, windows, etc., at the wholesale and retail level. The worker was engaged as a sales manager who trained sales staff, resolved customer issues, provided customer assistance, processed payments and was an authorized signer on the firm's bank account. She received a Form 1099-MISC for her services in 2017 as well as in 2016; she continued to work in 2018 and provided evidence that withholdings were taken from her pay. There was no 2018 pay document provided by either party. There was no written agreement.

The worker received no training and/or instructions. She received her work assignments from customers and sales leads. The worker was responsible for soliciting new customers via word of mouth, advertising and social media outlets. She received leads from the firm's chat box/quote request form and via the website, phone, online, and email. She and her sales team determined the methods by which the assignments were performed. The operations manager would be contacted if any issues or problems arose. There were no required reports. The worker worked set scheduled hours each work day and worked at the firm's premises. There were sales and staff meetings. The worker was required to provide the services personally with only the firm's operation manager hiring and paying any substitute workers.

The firm provided the computer, desk, phone, printer, and office supplies. The worker supplied a cell phone; the firm noted that she provided a computer as well. The worker incurred expenses for facebook advertising, for commission to other workers as well as for other monies given to the firm when it was short of funds. She was paid a commission and incurred a loss of withheld taxes never paid in, commission to others as well as other monies deposited into the firm's account. The customer paid the firm. The firm established the level of payment for services.

There were no benefits. Either party could terminate the relationship without incurring a liability. The worker did not perform similar services for others. She advertised the firm via facebook. 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 worker was engaged as a sales manager for the firm's sales business. While there was some disagreement between the parties about whether the worker worked set scheduled hours, the worker managed and trained other workers. It is reasonable to assume that she would need to be in the firm's office. 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. The worker worked at the firm's location and was provided with a workspace. If the work is performed on the premises of the person or persons for whom the services are performed, that factor suggests control over the worker, especially if the work could be done elsewhere. Work done off the premises of the person or persons receiving the services, indicates some freedom from control. However, this fact by itself does not mean that the worker is not an employee. In addition, the worker was required to personally provide the services on a continuous basis. This indicated that the firm was concerned about the methods used to perform her services as well as the results achieved. The continuing relationship between the worker and the firm for a few years also indicated that an employer-employee relationship existed.

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 worker was paid a commission and could make more or less dependent on her sales' activities. The opportunity for higher earnings or of gain or loss from a commission arrangement is not considered profit or loss. It was the firm that provided the workplace, workspace, furnishings, equipment and supplies. Lack of significant investment by a person in facilities or equipment used in performing services for another indicates dependence on the employer and, accordingly, the existence of an employer-employee relationship. 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.

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. Undoubtedly, the worker's services as a sales manager were necessary 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.

The firm had indicated that the worker knew that she would be receiving a Form 1099 and had no problem with that. However, in *Bartels v. Birmingham*, 332 U.S. 126, 1947-2 C. B.174, the Supreme Court stated that whether there is an employment relationship is a question of fact and not subject to negotiation between the parties. So even if two parties agree to an independent contractor relationship but that relationship is not supported by the facts, it cannot simply be established by agreement between the two parties.

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.