

SS-8 Determination—Determination for Public Inspection

Occupation 05CSI Personal Service Provider	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 elderly care. The worker was engaged as a caregiver and companion for the elderly. She received a Form 1099-MISC for her services in 2017; she started in 2016 and continued to provide services in 2018 as well. There was no written, signed agreement between the worker and the firm.

The firm obtained the caregiving work by the client contacting the firm. The client was visited by the firm to assess the living and needs requirement. There was no written agreement between the firm and the client. According to the worker, the firm told the worker where to go and for how many hours. The firm performed an initial background check on the worker. The firm noted that the worker would be given information about the client; the client also informed the worker of their needs as well. The firm noted that it would be the client who determined the methods and would be contacted if any issues arose. Both parties agreed that there were no required reports though a log book was maintained of the worker's time and activities. The firm noted that the worker's routine consisted of providing care to the elderly in their homes. The worker described that she worked scheduled hours, set by the firm, at the clients' premises. There were no meetings. The worker was required to provide the services personally; the firm disagreed. Both agreed that the firm hired and paid any substitutes.

Both the firm and the worker agreed that the firm and the worker provided nothing; the client provided everything. Both parties agreed that the worker was paid an hourly rate on a weekly basis, and had no other economic risk. The customer paid the firm. The worker did not establish the level of payment for services; the firm did. The firm also noted that it carried worker's compensation on the worker.

Both the firm and the worker agreed that there were no benefits though the worker mentioned that she received a Christmas bonus. Either party could terminate the relationship without incurring a liability. The worker did not perform similar services for others; the firm did not know. Both parties agreed that the worker provided her services under the firm's name. 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. 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 obtained the caregiving jobs by clients contacting the firm for those services. The work arrangements were made between the firm and its clients. While the worker did not receive training or direct supervision from the firm, she was given instructions as far as where to go, when to go and what was expected. A worker who is required to comply with another person's instructions about when, where, and how he or she is to work is ordinarily an employee. This control factor is present if the person or persons for whom the services are performed have the right to require compliance with instructions. The worker provided her services based on her availability to do so. Based on that information, the firm matched and scheduled the worker with a client. Usually, 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. There was a logbook updated by the worker and confirmed by the client; this included her hours worked which would be billed by the firm. A requirement that a worker submit regular or written reports to the person or persons for whom the services are performed indicates a degree of control. Although the firm indicated that the worker was not required to personally provide the services, the worker could not simply send anyone to take her place. The firm had performed a background check on the worker which indicated that the firm had an interest in the personnel that it sent out to its clients. If unable to report to work for her scheduled hours, the firm would send an acceptable substitute in her place. In addition, the worker's services were continuous. 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 worker had no investment; she simply received an hourly rate of pay, was paid weekly, 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. In fact, she was paid whether or not the firm had received the client's monies at the time of payment.

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. However, if it was the firm's belief that the worker would be an independent contractor pursuant to an agreement, that belief is without merit. For federal employment tax purposes, it is the actual working relationship that is controlling and not the terms of the contract (oral or written) between the parties. The worker was engaged to provide caregiving services for the firm's business, which was to provide caregiving services. When working for the firm, the worker was not engaged in a separate business venture. Her services were part of the firm's operations. 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.