

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 worker submitted a request for a determination of worker status in regard to services performed for the firm from 2015 to 2018 as a sales representative. The firm issued the worker Form 1099-MISC for 2015 through 2018. The worker filed Form SS-8 as they believe they received Form 1099-MISC in error because the firm paid for all of the worker's expenses. There was no written agreement between the parties. The firm's response states it is a janitorial supply company. The work provided by the worker was sales. The worker was requested to perform sales and support for the firm's clients and products. The firm believes the worker is an independent contractor because they established their own responsibility within their sales territory and determined their own schedules.

The firm states that the worker received minimal product training from the firm because the worker was already familiar with the product and it's benefits to the market. The firm also states that regarding sales, the worker did not receive any training because they were already in the sales business or had extensive sales experience. The worker would receive work assignments are part of a collaborative effort between themselves and the management of the firm, creating a plan to sell for each sales territory, which would include sales targets and major sales activities. The worker determined the methods by which job assignments were performed. If problems arose during job duties, the firm had a customer service department that would handle problem resolution or the firm's president would address any administrative concerns. The worker was required to provide the firm with sales forecasts but there were no formal reports due from the worker for the firm. The worker created their own schedule at their discretion. The firm states that the worker's services were provided at their own home or shop. The firm states that there were minimal meetings as the sales rep was already experienced with the line of work. Trade shows and other sales events were encouraged to attend but there were no penalties if the worker was unable to attend. The firm states that the worker was able to hire and pay any substitutes or helpers needed because they operated as an independent business, but the firm does not believe that they did so. The firm states that the worker did not have to provide services personally. The worker states that they were given in-depth product training at headquarters and trade shows. The worker received leads weekly. The worker states that problem resolution was jointly addressed by the worker and someone at the corporate level of the firm. The worker states that they were required to provide weekly call sheets and planners and expense reports to the firm. The worker attached copies of example reports they had to provide to the firm. The worker states that they would regularly call on end user customers and schedule demos with distributors. The worker states that they were required to perform all services personally.

The firm states that they provided the worker with a computer, car and phone allowance, specific tools and supplies for the firm's products, and the worker had to provide their own phone, car, office space, and general office supplies and tools. The firm states that they are unaware of whether or not the worker had to lease space, facilities or equipment. The firm states that the worker incurred expenses on travel, office supplies and tools, and the firm reimbursed the worker air travel that was exclusive to the company duties, the car allowance and the phone allowance. The worker was paid a fixed monthly fee for services and support and did not have access to a drawing account for advances. The customer would pay the firm, and the firm carried worker's compensation insurance on the worker. The firm states that the worker faced economic loss of their auto due to any damage during travel, insurances, and the cost of phone or rent. The firm established the level of payment for all services rendered. The worker states that the firm provided business cards, computer, samples, and supplies for their job and they did not have to provide anything. The worker did not have to lease space, facilities, or equipment. The worker states that all necessary expenses were reimbursed by the firm. The worker attached expense reports to demonstrate this detail. The worker states that they received a commission rate on a monthly basis, and that it was the same amount for four years. The worker did not have access to a drawing account for advances. The customer would pay the firm for all services rendered. The firm did not carry worker's compensation insurance on the worker. The worker did not have any exposure to financial risk or economic loss. The firm set the level of payment for all services rendered.

The firm states that they did not provide the worker with any benefits. The relationship could be terminated by either party at any time without incurring loss or liability. The firm states that they were unaware if the worker performed similar services for any other firm. The worker was not a member of a union. The firm states that the worker was allowed to sell other products as long as they did not compete with the firm's line of products. The firm did not know if the worker did any advertising to the public. The worker was represented by the firm as a territory sales representative. The work relationship ended when the worker chose to follow another job opportunity with a distributor of the firm. The worker states that they received paid vacations, sick days, paid holidays, and personal days as benefits from the firm. The worker did not perform similar services for any other firms while working for the firm. The worker did not advertise their services to the public. The worker states that they were represented as an associate under the firm's name. The worker states that the work relationship ended when they were let go because they sold products to another firm.

Analysis

Generally, the relationship of employer and employee exists when the person for whom the services are performed has the right to control and direct the individual who performs the services, not only as to what is to be done, but also how it is to be done. It is not necessary that the employer actually direct or control the individual, it is sufficient if he or she has the right to do so.

Section 31.3121(d)-1(a)(3) of the regulations provides that if the relationship of an employer and employee exists, the designation or description of the parties as anything other than that of employer and employee is immaterial. Thus, if an employer-employee relationship exists, any contractual designation of the employee as a partner, coadventurer, agent, or independent contractor must be disregarded.

Therefore, a statement that a worker is an independent contractor pursuant to a written or verbal agreement 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. Furthermore, whether there is an employment relationship is a question of fact and not subject to negotiation between the parties.

If the services must be rendered personally, presumably the person or persons for whom the services are performed are interested in the methods used to accomplish the work as well as in the results. In this case, the firm required the worker to personally perform services. Furthermore, the services performed by the worker were integral to the firm's business operation of selling products. The firm provided work assignments by virtue of the customers served, required the worker to report on services performed, and assumed responsibility for problem resolution. These facts evidence the firm retained the right to direct and control the worker to the extent necessary to ensure satisfactory job performance in a manner acceptable to the firm. Based on the worker's education, past work experience, and work ethic the firm may not have needed to frequently exercise its right to direct and control the worker; however, the facts evidence the firm retained the right to do so if needed.

Payment by the hour, day, 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 such instances, the firm assumes the hazard that the services of the worker will be proportionate to the regular payments. This action warrants the assumption that, to protect its investment, the firm has the right to direct and control the performance of the workers. Also, workers are assumed to be employees if they are guaranteed a minimum salary or are given a drawing account of a specified amount that need not be repaid when it exceeds earnings. In this case, the worker did not invest capital or assume business risks. 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. Based on the fixed monthly rate of pay arrangement the worker could not realize a profit or incur a loss.

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. In this case, the worker was not engaged in an independent enterprise, but rather the services performed by the worker were a necessary and integral part of the firm's business. Both parties retained the right to terminate the work relationship at any time without incurring a liability. There is no evidence to suggest the worker performed similar services for others as an independent contractor or advertised business services to the general public during the term of this work relationship. The classification of a worker as an independent contractor should not be based primarily on the fact that a worker's services may be used on a temporary, part-time, or as-needed basis. As noted above, common law factors are considered when examining the worker classification issue.

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.

The firm can obtain additional information related to worker classification online at www.irs.gov; Publication 4341.