

SS-8 Determination—Determination for Public Inspection

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| Occupation 02ADM Managers/Supervisors/Administrators | Determination: <input checked="" type="checkbox"/> Employee <input type="checkbox"/> Contractor |
| UILC | Third Party Communication: <input checked="" type="checkbox"/> None <input type="checkbox"/> Yes |

Facts of Case

The worker requested a determination of employment status for services performed for the firm in 2015 and 2016 as an office manager. The firm is in the real estate business and responded to our request for information as follows:

The firm is in the business of selling real estate. The firm stated that the worker performed services as an independent real estate agent, escrow coordinator, and offered BPO services. The firm believes the worker was treated correctly as an independent contractor because she set her own hours and was paid on a commission basis. The firm stated there was a contract but it is missing. The firm stated that the worker acquired her own training prior to working with the firm. She followed her own leads and determined her own methods. The worker was required to contact the firm with problems. She was free to work from home but she also utilized the firm's office as needed. She personally performed her services. The firm provided a computer, desk and supplies and the worker paid her own real estate dues. The worker was paid on a commission basis. Customers paid the firm. No benefits were received. Either party could have terminated without liability. The worker was let go.

The worker stated she performed office manager duties. She answered phones, made appointments, updated files through the escrow process, designed flyer's for open houses, updated the company website, etc. She stated she performed all her services at the firm's premises. everything was provided and she was paid an hourly rate.

Analysis

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.

Evidence of control generally falls into three categories: behavioral control, financial control, and relationship of the parties, which are collectively referred to as the categories of evidence. In weighing the evidence, careful consideration has been given to the factors outlined below. Therefore, a statement that the worker was an independent contractor pursuant to an 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.

Factors that illustrate whether there is a right to control how a worker performs a task include training and instructions. In this case, you retained the right to change the worker's methods and to direct the worker to the extent necessary to protect the business. 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. Some employees may work without receiving instructions because they are highly proficient and conscientious workers or because the duties are so simple or familiar to them.

Furthermore, the instructions, that show how to reach the desired results, may have been oral and given only once at the beginning of the relationship. Although the worker may have been given a lot of flexibility in her job, the firm maintained the right to direct and control the worker whether or not they exercised that right.

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. 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. Also, if the firm has the right to control the equipment, it is unlikely the worker had an investment in facilities. The worker performed her services at the firm's location and everything was provided.

A person who can realize a profit or suffer a loss as a result of his or her services is generally an independent contractor, while the person who cannot is an employee. "Profit or loss" implies the use of capital by a person in an independent business of his or her own. The risk that a worker will not receive payment for his or her services, however, is common to both independent contractors and employees and, thus, does not constitute a sufficient economic risk to support treatment as an independent contractor. If a worker loses payment from the firm's customer for poor work, the firm shares the risk of such loss. Control of the firm over the worker would be necessary in order to reduce the risk of financial loss to the firm. The opportunity for higher earnings or of gain or loss from a commission arrangement is not considered profit or loss. The worker had no investment in the firm's business and could not suffer a loss. The worker performed her services as a representative of the firm was not operating a separate business performing these services.

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.

Firm: For further information please go to www.irs.gov Publication 4341