

SS-8 Determination—Determination for Public Inspection

Occupation 02CON Consultants	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 a financial planning services business. The firm states it engaged the worker on a short-term basis as a consultant to perform administrative support while transitioning into a commission based financial advisor position. The firm states the worker's services were performed under an oral/verbal agreement, and as a result the firm issued to the worker a Form 1099-MISC at year-end to report the monies received for his administrative support services as non-employee compensation.

The worker received training and instructions from the firm's owner regarding computer systems, conducting meetings, phone calls, and wording of customer correspondence. The firm's owner assigned work assignments, and determined the work methods by which to perform the services. The worker was required to contact either the firm's owner or the office manager regarding problems/complaints that needed resolution. The worker was required to perform his services personally, at the firm's office, and occasionally in the field when meeting clients.

The firm provided the worker with the office space, office supplies and equipment, computer systems, and software needed to perform the services. The worker provided his own laptop, cell phone, and licensing materials. The worker incurred expenses for those items, and for other expenses such as state registration, licensing fees, error & omissions, and software. There was no information provided to support that the firm reimbursed the worker for expenses he incurred. The firm paid the worker on a salary basis for his services. Clients made payment to the firm for services rendered. The firm indicated that the worker's economic loss/financial risks related to personal responsibility for fines, suspension (██████), lawsuits, fraud, malpractice, and license revocation.

The firm did not cover the worker under workers' compensation insurance. The parties disagree as to whether or not employment benefits were made available to the worker. The parties agree that the worker did not perform similar services for others, nor did he advertise his services to others during his training period. The work relationship could have been terminated by either party at any time without incurring liabilities.

Analysis

The 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.

The facts provided for this case do not evidence the worker's behavioral control of the work relationship. The worker performed his services under the firm's supervision, following its instructions, training, work methods, schedule, and routine. The worker's services were performed personally, and he represented the firm in the performance of his services. As a result, the firm retained the right to direct and control the worker to the extent necessary to protect its investment, and the reputation of its business operations.

The facts provided for this case do not evidence the worker's financial control of the work relationship. The worker's remuneration was salary based. The worker had no opportunity for profit or loss as a result of the services performed for the firm. "Profit or loss" implies the use of capital by a person in an independent business of his or her own. The worker did not have a significant investment in the facilities, equipment, tools, or supplies used to perform his services for the firm. 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 services as requested by the firm, for an indefinite period of time, and both parties retained the right to terminate the work relationship at any time without incurring liabilities. The facts provided for this case do not evidence that the worker was engaged in an independent enterprise, but rather show that he performed his services as a necessary and integral part of the firm's business 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 common law principles, the worker shall be found to be an employee for Federal employment tax purposes. For correction assistance, you may refer to Publication 4341, which can be obtained at www.irs.gov