

SS-8 Determination—Determination for Public Inspection

Occupation

02OFF Office Workers

Determination:

☒ Employee☐ Contractor

UILC

Third Party Communication:

☒ None☐ 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 April 2016 to July 2017 as a receptionist. The work she performed included answering phones, scheduling appointments, escorting customers into service areas, opening and closing the store, balancing receipts at end of her work day, etc.. The firm issued her Form 1099-MISC for the years in question. She filed Form SS-8 as she believes she erroneously received Form 1099-MISC.

The firm's response states its business is a day spa. The worker was engaged as a spa representative. The work done by the worker included providing spa services such as foot baths, cave sessions, and selling spa products. The worker was classified as an independent contractor as she determined her work hours, which were approved by the spa staff. The worker contracted with the firm by mutual agreement. Either party could end the work relationship at any time. There was no written agreement between the parties.

The firm stated it provided the worker specific training on its spa services and how to use its scheduling software. Work assignments were primarily customer directed; however, some additional projects were also assigned by the firm. The worker was responsible for problem resolution; however, she could have requested help from the firm's management. The only report required was the billing report which documented the worker's start and end times and total hours worked for each day worked in a two-week period. The worker's schedule varied. Services were performed at the firm's premises. Meetings were not required. The firm required the worker to personally perform services. The firm ultimately hired and paid substitutes or helpers. The worker stated the firm's operational/management training included how to execute services offered, how to answer the front desk phones and use the firm's reservation system, how to process payments, etc. Work assignments were verbally communicated and consisted of standard daily tasks of running the store and wellness center. The firm determined the methods by which assignments were performed and it assumed responsibility for problem resolution. When out of town, the firm required her to email daily income received. On average she worked 20 – 30 hours per week. The firm required her to attend staff meetings as scheduled.

The firm stated it provided spa equipment and facilities. The worker provided uniforms and transportation. The worker did not lease equipment, space, or a facility. The worker would have incurred the expense associated with anything outside of the firm's facilities and equipment. Customers paid the firm. The firm paid the worker an hourly rate of pay; a drawing account for advances was not allowed. The firm did not carry workers' compensation insurance on the worker. The worker's economic loss or financial risk related to any damage incurred on her own supplies and equipment or any intentional damages to the firm's equipment. The worker did not establish the level of payment for the services provided or the products sold. The worker stated the firm provided all supplies, equipment, and materials. She did not incur expenses in the performance of services for the firm, other than casual business attire. She did not incur economic loss or financial risk. The firm established the level of payment for the services provided and the products sold.

The firm stated benefits were not provided. The work relationship could be terminated by either party without incurring liability or penalty. It is unknown if the worker performed similar services for others or advertised. There was no agreement prohibiting competition between the parties. The firm represented the worker as a representative to its customers. The work relationship ended when the worker stopped providing services with no prior notice given. The worker stated she did not perform similar services for others or advertise. The firm represented her as an employee to its customers. Services were performed under the firm's business name. The work relationship ended when she quit.

The firm stated the worker was responsible for soliciting new customers by responding to phone inquiries, marketing to foot traffic, and other marketing such as fliers, etc. Leads primarily contacted the worker. Cancellation and return policies were established by the firm. Spa products and services were sold in the firm's retail establishment. The worker stated at one time she was required to go into neighborhoods to hand out the firm's pamphlets. The firm provided leads to prospective customers.

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, the firm's statement that the worker was an independent contractor pursuant to a 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.

Training a worker by requiring an experienced employee to work with the worker, by corresponding with the worker, by requiring the worker to attend meetings, or by using other methods, indicates that the person or persons for whom the services are performed want the services performed in a particular method or manner. This is true even if the training was only given once at the beginning of the work relationship. In this case, the firm providing on-the-job training to ensure the worker performed services as required by the firm. The firm ultimately 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, 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 hourly rate of pay arrangement the worker could not have realized a profit or incurred 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.