

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 September 2018 to February 2019 as a personal and office assistant. The work done by the worker included handling phone calls, emails, and invoices; updating the firm's website and social media pages. Other duties included moving furniture around and keeping the reception room tidy, tracking inventory, placing inventory orders, etc. The firm issued the worker Form 1099-MISC for 2018. A copy of the 2019 tax reporting document was not provided for our review. The worker filed Form SS-8 as she believes she erroneously received Form 1099-MISC.

The firm's response states it is a cosmetology goods and services business. The worker was engaged to answer phones and emails/texts; schedule appointments for all artists; process payments from clients; assist artists, as needed, with inventory, etc.; arrange meetings; organize team functions; assist in marketing, website development, and public relations; inventory. The worker was classified as an independent contractor because she was given freedom to decide which projects to address and she was not paid regularly but rather paid based on how many clients were served each week. The worker signed a contractor agreement.

The firm stated it did not provide the worker specific training. The firm sent the worker text messages with work assignments. The worker determined the methods by which assignments were performed. The firm was contacted if problems or complaints arose. The firm was responsible for resolution. Reports included periodic progress reports. The worker's daily routine consisted of managing the firm's social media and on-line presence, public promotions, public relations, and media management. Services were performed at the firm's shop. The worker was required to attend only disciplinary meetings. The firm required the worker to personally perform services. Hiring substitutes or helpers was not applicable. The worker stated the firm instructed her as to what needed to be done each work day. The firm determined the methods by which assignments were performed. Services were performed on a regularly scheduled basis, i.e. typically 8 am to 5 pm. The firm was responsible for hiring and paying substitutes or helpers.

The firm stated it provided a phone and laptop. The worker did not provide supplies, equipment, or materials. The worker did not lease equipment, space, or a facility. The worker did not incur expenses in the performance of services for the firm. Customers paid the firm. The firm paid the worker piece work; a drawing account for advances was not allowed. The firm did not carry workers' compensation insurance on the worker. The worker did not incur economic loss or financial risk. The firm established the level of payment for the services provided or the products sold. The worker stated the firm also provided her a work cell phone, in addition to a work t-shirt. The firm paid her an hourly rate of pay.

The firm stated the work relationship could not be terminated by either party without incurring liability or penalty due to the confidentiality and non-compete clauses found in the contractor agreement. The worker did not perform similar services for others during the period in question. Copies of various ads promote the firm's business and services. The worker stated the benefit of bonuses was made available to her. The firm represented her as an employee or receptionist to its customers. Services were performed under the firm's business name. The work relationship ended when she quit.

The contractor agreement states, in part, the worker was responsible for completing certain duties (as listed above). The worker would perform all activities, including those activities the firm required of the worker to perform, according to the firm's specifications and requirements. The firm could terminate the agreement without notice for wrongful conduct by the worker. The method of compensation was not documented in the copy of the contractor agreement provided for our review. During the term of the agreement and for a period of two years from the date of termination the worker would not compete for the firm's business within a specific radius of each of the firm's registered offices.

The firm stated the worker received inbound calls and managed social media platforms in soliciting new customers. The firm provided the worker leads to prospective customers. The firm requested periodic updates on the status of new customers. Services included facial and eyelash products; creams, serums, and foam products were sold.

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 written 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. The firm provided work assignments, required the worker to provide progress reports, 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.

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. 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. As acknowledged by the firm, the worker did not incur economic loss or financial risk. Based on the piece work or hourly 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. 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.