

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 November 2016 to October 2018 as a cashier/salesclerk. The firm issued the worker Form 1099-MISC for the years in question. The worker filed Form SS-8 as she believes she erroneously received Form 1099-MISC.

The firm's response states its business is the sale of rocks, minerals, healing stones, and the development of educational and other supporting materials and products. In 2016, the worker was engaged on an as-needed, flexible basis. In addition to the worker's time in store, the worker was to use her skills to develop a spreadsheet-based inventory; to make decisions regarding product pricing in particular with consignees; and to send out newsletters for the firm from the worker's home on her own computer. In July 2017, the firm's full-time employee informed the firm she would be leaving in May 2018 and she had offered the position to the worker. The firm felt it had no option but to comply with the arrangement. The worker invoiced the firm for services performed and requested to be paid as an independent contractor, receiving Form 1099-MISC.

The firm stated it did not provide the worker specific training or instruction. The worker presented herself with expert knowledge of payroll matters and spreadsheets. Work assignments were provided verbally. The worker determined the methods by which assignments were performed. The firm was contacted and assumed responsibility for problem resolution. Reports were not required other than maintaining inventory. Initially the worker was to attend the store when needed, on a flexible basis. In June 2018, she worked five days per week in the store. Services were performed at the firm's premises, 90% of the worker's time, and worker's home, 10% of her time. Meeting were not required. The firm required the worker to personally perform services. The worker stated the firm provided her specific instruction related to use of its register and inventory. The firm determined the methods by which assignments were performed. Her work routine consisted of opening the store and remaining on-site until the store closed. The firm was responsible for hiring and paying substitutes or helpers.

The firm stated it provided computer equipment. The worker provided computer equipment when working at home. 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 as invoiced; a drawing account for advances was not allowed. A copy of an invoice provided by the firm documents the worker invoiced for an hourly rate of pay. The firm did not carry workers' compensation insurance on the worker. The worker did not incur economic loss or financial risk. The worker established the level of payment for the services provided. The worker stated she did not establish the level of payment for the services provided.

The firm stated benefits were not provided. The work relationship could be terminated by either party without incurring liability or penalty. It was understood the worker performed similar services for another organization. The firm's approval was not required for her to do so. There was no agreement prohibiting competition between the parties. It is unknown if the worker advertised. The firm represented the worker by her name to its customers. Services were performed under the firm's d/b/a name. The work relationship ended when the worker walked out. The worker stated she did not perform similar services for others or advertise. The firm represented her as an employee to its customers.

Both parties agreed the worker was not responsible for soliciting new 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, 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. The firm provided work assignments 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, 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. As the worker presumably used her computer for personal needs, it is not considered a significant investment. As acknowledged by the firm, the worker did not incur economic loss or financial risk. Based on the 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. 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.