

SS-8 Determination—Determination for Public Inspection

Occupation

Business/Computer Services/Office/Sales

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 is seeking a determination of worker classification for services performed as a customer service representative for the firm from September 2020 until March 2021. The worker received a 1099-MISC from the firm for 2020. The worker feels that they were misclassified by the firm as an independent contractor because they were paid an hourly wage, the firm gave the worker a schedule, the worker helped the firm's customers and checked them out, and the worker cleaned. There were no written agreements between the parties.

The firm states that it is a pottery painting studio. The worker was requested to provide customer service to its customers.

The firm states that the worker was instructed to provide customer service to the firm's customers. The worker would receive work assignments from the firm owner. The firm owner determined the methods by which job assignments were performed. If the worker encountered any problems or complaints while working, they were required to contact the firm owner for problem resolution. The worker was not responsible for any reports. The worker was requested to help customers select the paints for their ceramic projects. The worker performed services on various days from 12pm until 6pm. All job duties were performed at the firm's studio premises. The worker did not have to attend any meetings. The firm required the worker to perform services personally. The firm owner was responsible for hiring and paying all helpers and substitutes needed. The worker states that the firm trained the worker on how to run the cash register and cleaning expectations. The worker received job assignments from the owner, who determined the methods by which job assignments were performed. The worker was required to contact the firm owner for problem resolution. There were no reports required of the worker. The worker would sometimes open the studio when the owner was late and would assist customers. Job duties were performed at the firm's studio premises. There were no meetings required of the worker and was required to perform services personally. The owner hired and paid all helpers needed.

The firm states that they provided everything needed for the worker's job duties. The worker did not lease any space, facilities, or equipment. The worker incurred no expenses and was paid an hourly wage by the firm. The worker did not have access to a drawing account for advances. Customers paid the firm for services provided. The firm did not carry worker's compensation insurance on the worker. The worker faced no economic loss or financial risk. The worker established the level of payment for services provided. The worker states that the firm provided everything needed for the worker's job duties. The worker did not provide or lease anything. The worker's only expense was gas to and from work. The firm paid the worker an hourly wage with no access to a drawing account for advances. Customers paid the firm. The worker faced no economic loss or financial risk. The firm established the level of payment for services provided.

The firm states that the relationship between the parties could be terminated by either party without liability or penalty. The worker did not perform similar services for other firms. There were no non-compete agreements between the parties. The worker was not a member of a union and did not advertise their services to the public. The worker was represented by the firm as a representative performing services under the firm's name. The worker was fired for leaving work without permission. The worker states that there were no benefits offered by the firm. The worker did not perform similar services for other firms. The worker did not advertise their services to the public and was not a member of a union. The worker was represented by the firm as an employee of the firm. The worker was fired for asking for a sick day.

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 by virtue of the customers served 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, day, 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 firm provided all supplies, materials, and equipment needed for the job duties. 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 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.