

**SS-8 Determination—Determination for Public Inspection**

Occupation

02RET Retail 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 January 2018 to October 2018 as a store clerk. The services performed included ringing up sales, completing daily inventory and sales sheets, making bank deposits, assisting customers, and other general store clerk responsibilities. The firm issued the worker Form 1099-MISC for 2018. 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. The firm needed an additional person to assist in the store during busy times, the role being to take money. The worker's creative ability was also utilized for display and new product development purposes. The worker was to perform services on an as-needed, as-available basis, which the worker determined. The worker invoiced the firm for services performed. There was no written agreement between the parties.

The firm stated it did not provide the worker specific training or instruction. It was understood the worker had the knowledge and skills required to complete the work. Work assignments were provided to the worker verbally. The worker determined the methods by which assignments were performed. The firm's member managers were contacted and assumed responsibility for problem resolution. Reports and meetings were not required. Initially the worker was to perform services on an as-needed, as-available basis. Over time, the worker demanded more time on a more fixed schedule. Services were performed at the firm's premises, 60% of the worker's time, and worker's home, 40% of her time. The firm required the worker to personally perform services. It is believed the worker's family members may have helped; however, it is unknown if they were paid by the worker. The worker stated the firm provided her on-the-job training. The firm determined the methods by which assignments were performed. Reports included daily sales and inventory reports, as well as a cash count report. She worked as scheduled by the firm. The work routine consisted of opening the store, counting the money and loading the cash register, assisting customers, and ringing up sales. Services were performed at the firm's retail store location. The firm was responsible for hiring and paying substitutes or helpers.

The firm stated it provided pens, markers, and geode slices. The worker provided her computer equipment. 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. Copies provided by the firm document 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 the firm provided all supplies. The firm established 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 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 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. She quit.

Both parties agreed the worker was not responsible for soliciting new customers.

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## 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](http://www.irs.gov); Publication 4341.