

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, a production assistant and retail sales associate, submitted Form SS-8 related to services she provided in 2018 to the Firm, a toiletries maker and retail sales operation. The Worker attached copies of forms 1099-MISC from the Firm for TY2018. The Worker believes she was the Firm's employee and should have been issued Form W-2. The Firm submitted a Form SS-8 with copies of forms 1099-MISC issued to the Worker for TY2018. The Firm believes the Worker was an independent contractor. The parties agree the Worker didn't provide services to the Firm in any capacity before providing the services related to this case. The parties appear to agree there was no written agreement between them under which the Worker provided services to the Firm, although the Firm noted on its Form SS-8 Part I, question 11, "all team members are contractors and issued a 1099 at the beginning of the calendar year." It's unclear if the Firm considered this an agreement, but it has no bearing on the determination made.

BEHAVIORAL CONTROL:

The parties generally agree on these points:

- the Firm gave the Worker on-site training on how to produce the Firm's products;
- the Firm gave the Worker her work assignments;
- the Firm determined how the Worker was to perform her assignments;
- the Firm required the Worker to contact the Firm if problems or complaints arose;
- the Firm was responsible to resolve any problems or complaints;
- the Firm didn't require any reports from the Worker;
- the Worker did 100% of her work at the Firm's shop;
- the Firm didn't require the Worker to attend meetings; and
- the Firm required the Worker to personally provide the services at issue.

According to the Firm, it gave the Worker flexibility in her hours, including arrival and departure times, so long as the Worker satisfied the Firm's production quantity requirements. The Worker maintains the Firm told her to arrive at work every day at a scheduled time; she describes her daily routine as "interact with customers, help operate the boutique, and help make the soap products."

FINANCIAL:

The parties generally agree on these points:

- the Firm provided all supplies, materials, and equipment necessary for the Worker to do her job;
- the Worker didn't provide any supplies, materials, or equipment needed to do her job;
- the Worker didn't lease equipment, space, or a facility;
- the Worker incurred no expenses in performing services for the Firm;
- the Firm paid the Worker an hourly wage;
- the Firm didn't allow the Worker a drawing account for advances;
- the Firm's customers paid the Firm;
- the Worker didn't set the level of payment for services provided or products sold;
- the Firm didn't carry worker's compensation insurance on the Worker; and
- the Worker didn't incur economic loss or financial risk working for the Firm.

RELATIONSHIP OF THE WORKER AND FIRM:

The parties generally agree on these points:

- the Firm didn't make benefits available to the Worker;
- their working relationship could be terminated by either party without incurring liability;
- the Worker didn't perform similar services for others during the time she worked for the Firm;
- the parties didn't have any non-compete agreements between them;
- the Worker wasn't a union member;
- the Firm represented the Worker to its customers as a Firm "team member";
- their relationship ended when the Worker quit to pursue a job elsewhere.

The Firm states "N/A" in its response to Form SS-8, Part IV, question 6, and the Worker maintains she didn't do any advertising.

Analysis

It's essential for workers and the individuals or entities they're working for to understand that if an employer-employee relationship exists, any oral or written contract, agreement, mutual intent, or understanding between the parties that designates the worker as an independent contractor must be disregarded when determining worker classification for federal employment tax purposes. In this context, under the required common law standard, the actual working relationship between the parties is what matters. IRC 31.3121(d)-1(c).

The relationship of employer and employee generally exists when the person or entity the worker is providing services to has the right to control and direct what the worker does and how the worker does it. It isn't necessary for the person or entity to actively direct or control the worker, only for it to have the right to do so.

As noted in the preceding Case Facts section, the parties generally agree on almost all relevant facts concerning their working relationship. Notably, all the facts the parties agree on indicate the Firm had the right to control -- and did control -- what the Worker did and how she did it. From the beginning, the Firm trained the Worker on how to craft the Firm's bath and body products. In doing so, the Firm was showing the Worker exactly what methods it required her to use in carrying out the Firm's assignments. The Firm required the Worker to personally perform the tasks it assigned her, and to do them at the Firm's shop. These facts weigh toward an employer-employee relationship.

The Firm was responsible for the performance, quality, and standard of the Worker's output, and for its customers' satisfaction. The Firm's success depended on its ability to satisfy its customers with its products and service, so that those customers would continue purchasing the Firm's bath and body products and spread positive reviews. Thus, how the Worker conducted herself with customers and fulfilled the Firm's production assignments could impact the Firm's reputation and, ultimately, its survival as a viable business operation. This gave the Firm the right to direct and control the Worker in order to protect its financial investment, business reputation, and customer relationships. Based on these facts, it's reasonable to conclude the Worker's services were integral to the Firm's business operation. This points to the Worker being subject to the Firm's direction and control and is highly indicative of an employer-employee relationship.

Although the Firm gave the Worker flexibility in her hours, it also conditioned that flexibility on the Worker's timely satisfaction of the Firm's production quantity requirements. It's reasonable to interpret this conditionality to mean the Firm could also require a more rigid schedule if the Worker didn't meet its production requirements. In other words, the Firm -- not the Worker -- controlled whether the Worker's schedule was flexible; the Firm had the right to give flexibility, and it had the right to take it away. These facts weigh heavily toward the existence of an employer-employee relationship.

The Worker didn't have any financial stake or ownership share of an entity that could result in her incurring economic loss or financial risk, or realizing a profit, as a result of working for the Firm. While workers who can realize a profit or suffer a loss as a result of their services are generally independent contractors, workers who can't are generally employees. The facts here are indicative of the Worker being an employee.

While the Firm may have referred to the Worker as a contractor, it also represented the Worker to customers as the Firm's team member. The point to be made is this: what the Firm called the Worker, or referred to her as, or told the Worker she was, doesn't matter if the actual working relationship between the Firm and the Worker indicates otherwise. The Worker wasn't providing services to the Firm through engagement in an independent enterprise; rather, the services performed by the Worker as a Firm production assistant and retail sales associate were a necessary and integral component of the Firm's activities and mission. Aside from the parties' statements of fact, our own research also finds no evidence suggesting the Worker performed similar services for others as an independent contractor or advertised business services to the general public during the term of her work relationship with the Firm. This all points to an employer-employee relationship between the Worker and the Firm.

As noted above, common law factors are considered when examining worker classification issues. Based on the evidence and facts presented and researched, this analysis concludes the Firm had the right to direct and control the Worker to the degree necessary to establish the Worker was a common law employee of the Firm during the relevant time period, and not an independent contractor operating a trade or business. Accordingly, the Worker is classified as an employee of the Firm for employment tax purposes.

The Firm can obtain additional information related to worker classification on-line at www.irs.gov; IRS Publication 4341.