

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 firm's business is a women's retail clothing store. The firm engaged the worker as a sales associate from 2017 to 2020. The firm's perspective is the worker is an independent contractor because the worker created her own schedule, was not paid from a business account, and not supervised. Therefore, her treatment of an independent contractor by the firm is accurate. Both parties submitted a copy of an independent contractor's agreement. The agreement was presented to the worker by the firm. The agreement was not signed. The worker submitted a Form SS-8 after receiving a Form 1099-Misc from the firm. The firm replied with a Form SS-8.

The worker stated she received training and instructions from the firm. She stated she received on the job training. She was trained in sales, daily accounting procedures and inventory management. The firm contends the worker was only told of what the final output should look like and since the worker was an independent contractor, she did not need any training to perform the services for the firm. The worker stated she received her assignments verbally regarding the services to be performed and the firm determined the methods by which those assignments were to be performed. According to the firm, the worker did not receive work assignments from the firm. They contend the worker was told of expectations on the first day she started performing the services and the expectations should have been clear and unambiguous to the worker. The worker describes her schedule as arriving at the firm. She would then check with the owner for daily priorities, process inventory, assist with shipping and perform retail sales. The worker submitted as evidence a list of opening and closing duties she was required to adhere to while performing the services for the firm. The firm indicated the worker was able to create and manage her own schedule. The worker stated the firm was responsible for problem resolution. The firm stated the worker was able to resolve any issues or matters that arose. She received regular remunerations for her services. She performed the services on the firm's premises. The worker was not required to attend any meetings. The relationship between the parties was continuous, as opposed to a one-time transaction. The nature of this relationship contemplated that the worker would perform the services personally. The worker worked exclusively and on a continuing basis for the firm. Her services were an integral and necessary part of the services the firm provided to its customers. The firm stated the hiring and paying of substitutes or helpers was not applicable to this case.

Both parties agree the firm provided the worker with all necessary supplies, equipment, and materials to perform the services for the firm. The worker provided nothing to perform the services. The worker did not lease equipment. The firm determined the fees to be charged. The worker did not incur any significant business expenses. According to the worker, she was required to purchase and wear clothing from the store. She was required to wear this clothing while she was performing the services for the firm. The worker was paid an hourly wage. The firm did not allow the worker a drawing account, or advances against anticipated earnings. The firm's customers paid the firm. The firm did not carry worker's compensation insurance on the worker. The worker did not have a substantial investment in equipment or facilities used in the work and did not assume the usual business risks of an independent enterprise.

The worker was not eligible for sick pay, vacation pay, health insurance, or bonuses. Either party could terminate the work relationship at any time without incurring a penalty or liability. There was not a "non-compete" agreement between the parties. The worker was not a member of a union. According to internal research, the worker did not perform the services for others. She did not advertise her services to the public, or maintain an office, shop, or other place of business. The relationship between the parties ended when the worker resigned.

The information submitted on the Form SS-8 and the internal research conducted provided enough information to provide a determination for this case. The facts of the case indicate that the firm had the right to control the worker.

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.

In determining whether an individual is an employee or an independent contractor under the common law, all evidence of both control and lack of control or independence must be considered. We must examine the relationship of the worker and the business. We consider facts that show a right to direct or control how the worker performs the specific tasks for which he or she is hired, who controls the financial aspects of the worker's activities, and how the parties perceive their relationship. The degree of importance of each factor varies depending on the occupation and the context in which the services are performed.

A worker who is required to comply with another person's instructions about when, where, and how he or she is to work is ordinarily an employee. This control factor is present if the person or persons for whom the services are performed have the right to require compliance with instructions. Some employees may work without receiving instructions because they are highly proficient and conscientious workers or because the duties are so simple or familiar to them. Furthermore, the instructions, that show how to reach the desired results, may have been oral and given only once at the beginning of the relationship.

A continuing relationship between the worker and the person or persons for whom the services are performed indicates that an employer-employee relationship exists. A continuing relationship may exist where work is performed in frequently recurring although irregular intervals.

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.

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.

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.

Based on the common-law principles, the firm had the right to direct and control the worker. The worker shall be found to be an employee for Federal tax purposes.

The firm can obtain additional information related to worker classification online at www.irs.gov; Publication 4341.