

## SS-8 Determination—Determination for Public Inspection

Occupation

02RET.3 Retail Worker

Determination:

☒ Employee

☐ Contractor

UILC

Third Party Communication:

☒ None

☐ Yes

### Facts of Case

It is our usual practice in cases of this type to solicit information from both parties involved. Upon the submission of the Form SS-8 from the worker, we requested information from the firm concerning this work relationship. [REDACTED] responded to our request for completion of Form SS-8.

From the information provided the firm is a retail store of antiques and modern furniture and the worker was engaged as a sales clerk. The worker's duties included the selling of merchandise and the collection and record keeping of money. The firm states they hired the worker as an independent contractor (IC) and they told her of this when she was hired and upon her acceptance of the position with them. The firm reported the worker's 2013 earnings on a Form 1099-MISC.

The firm states they provided no training or assignments to the worker and the worker determined how she performed her services. The worker was required to personally perform her services at the firm's premises approximately 2 days per week; primarily Tuesdays and Saturdays from 10 a.m. to 5 p.m. and 10 a.m. to 3 p.m. respectively. The firm states the worker could close their shop early if it was not busy. The worker was required to account for all sales via invoices. The worker was not required to attend meetings. The firm states they were responsible for the paying of substitutes or helpers.

The firm states they provided equipment, supplies, and materials to the worker in order to perform her services. The worker did not incur expenses, she was paid at an hourly rate, and she did not have an opportunity to incur a loss as a result of her services. The clients paid the worker and the worker was required to submit all funds over to the firm. The firm states they determined the worker's rate of pay but the worker had the capability of negotiating prices with the customer.

The worker was not eligible for employee benefits. The worker did not perform similar services for others and she did not advertise her services. Either party could terminate the work relationship at any time without either party incurring a liability. The firm states they terminated the work relationship with the worker.

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## Analysis

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As is the case in almost all worker classification cases, some facts point to an employment relationship while other facts indicate independent contractor status. The determination of the worker's status, then, rests on the weight given to the factors, keeping in mind that no one factor rules. The degree of importance of each factor varies depending on the occupation and the circumstances.

Evidence of control generally falls into three categories: behavioral control, financial control, and relationship of the parties, which are collectively referred to as the categories of evidence. In weighing the evidence, careful consideration has been given to the factors outlined below.

Factors that illustrate whether there is a right to control how a worker performs a task include training and instructions. In this case, the worker was experienced in this line of work and did not require training or detailed instructions from the firm. The need to direct and control a worker and her services should not be confused with the right to direct and control. The worker provided her services on behalf of and under the firm's business name rather than an entity of her own. The firm was responsible for the quality of the work performed by the worker and for the satisfaction of their clients. This gave the firm the right to direct and control the worker and her services in order to protect their financial investment, their business reputation, and their relationship with their clients.

Factors that illustrate whether there is a right to direct and control the financial aspects of the worker's activities include significant investment, unreimbursed expenses, the methods of payment, and the opportunity for profit or loss. In this case, the worker did not invest capital or assume business risks, and therefore, did not have the opportunity to realize a profit or incur a loss as a result of the services provided.

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. If a firm has to make a worker "understand" or "agree to" being an independent contractor (as in a verbal or written agreement or the filing of a Form W-9), then the worker is not an independent contractor. An individual knows they are in business for themselves offering their services to the public and does not need to be made aware of, understand, or agree to be an independent contractor.

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, co-adventurer, agent, or independent contractor must be disregarded.

Therefore, the firm's statement that the worker was an independent contractor pursuant to an 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.

Both parties retained the right to terminate the work relationship at any time without incurring a liability.

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.