Form **14430-A**
(July 2013)

Department of the Treasury - Internal Revenue Service

SS-8 Determination—Determination for Public Inspection

Occupation	Determination:
RET - Retail Workers	☒ 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 determination in connection with services performed for the firm as a cashier and server. Services performed included serving customers food and drink, cashing out customers, and cleaning. The worker filed Form SS-8 as they believe they received Form 1099-NEC in error. The worker believes they were an employee of the firm as they received directives from the firm. The firm provided the worker with the equipment required to perform services.

The firm’s response did not state what their business was. The firm stated the worker did not have a job title. The worker would work for the firm. The worker was classified as an independent contractor as the worker performed services for the firm as they pleased.

The firm stated there was no training or instruction provided to the worker. The firm provided work assignments. The firm did not state who determined the methods by which those assignments were performed. The firm did not state who was responsible for problem resolution. The firm did not require the worker to complete any reports or attend any meetings. Services were performed by the worker on an as-available basis. The firm did not require the worker to perform services personally. The worker could hire substitutes or helpers; approval was not required by the firm. The worker did not pay for substitutes or helpers. The worker stated the firm provided training on how to make drinks and use the firm’s POS system. The firm provided work assignments and determined the methods by which those assignments were performed. The firm was responsible for problem resolution. Services were performed on the firm’s premises on a regularly scheduled basis. The worker was required to perform services personally. The firm was responsible for the hiring and paying of substitutes or helpers.

The firm did not state which party provided supplies, equipment, or the materials that were necessary to perform services. The worker did not lease space, equipment, or a facility. There were no job-related expenses incurred by the worker performing services for the firm. Customers paid the firm. The worker was paid an hourly rate of pay. The worker could not request advance pay. The worker did not take a financial risk and could not suffer a financial loss performing services. The firm did not state which party set the rate of pay for the services provided or products sold. The firm did not carry workers’ compensation insurance on the worker. The worker stated the firm provided all the necessary equipment, materials, and supplies that were needed to perform services. The firm set the rate of pay for the services provided.

The firm stated there were no benefits made available to the worker. Either party could end the work relationship without penalty. The worker did not perform similar services for others. The worker did not advertise their services. There were no agreements prohibiting competition. Services were performed under the worker’s name. The worker ended the work relationship. The worker stated services were performed under the firm’s business name. The firm ended the work relationship.

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.

Integration of the worker’s services into the business operations generally shows that the worker is subject to direction and control. When the success or continuation of a business depends to an appreciable degree upon the performance of certain services, the workers who perform those services must necessarily be subject to a certain amount of control by the owner of the business. In this case, the firm provided work assignments by virtue of customers served and ultimately 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 their right to direct and control the worker; however, the facts evidence the firm retained the right to do so if needed.

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

While the firm stated they provided the worker with freedom of action as to when they performed services, this in and of itself does not determine the worker’s status as an independent contractor. The whole relationship needed to be analyzed to determine the worker’s correct employment tax status. An important factor of determining a worker’s status is who had the contractual relationship with the customer and whom did the customer pay. In this case, that relationship was between the firm and their customers.

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 acknowledged by the firm, the worker did not take a financial risk and could not suffer a financial loss by performing services. 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 penalty. There is no evidence to suggest the worker performed similar services for others as an independent contractor or advertised business services to the 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.