

## SS-8 Determination—Determination for Public Inspection

Occupation

02SAL.120 Salesperson

Determination:

☒ Employee

☐ Contractor

UILC

Third Party Communication:

☒ None

☐ Yes

### Facts of Case

The firm is in the business of event planning and promotions. The worker was a college student engaged by the firm to perform services as an on-campus promotional representative to promote a brand of beer. The firm reported the worker's remuneration on Forms 1099-MISC for 2013 and 2014.

Information from the parties supports that the firm hired a team of four representatives on four college campuses, for a total of 16 representatives. The worker was hired in the fall of 2013 and rehired for the fall of 2014 while attending the [REDACTED] campus. The firm hired a manager to deal with the worker and other representatives performing the same services. The manager gave specific instructions to each worker. He provided the worker with his work assignments and the methods by which to perform them. If problems or complaints occurred, the worker contacted the manager for resolution. The worker was required to submit written summaries of his weekly duties. He did not have a routine schedule. The worker performed his services at bars, restaurants, residences, parties, on campus, etc. He attended meetings with the manager. The worker was required to perform his services personally.

The firm provided promotional materials. The worker was expected to pick up bar tabs; and was given specific weekly budgets to buy beer or pay bar tabs for friends. The firm paid the worker at an hourly rate on a weekly basis. The firm did not cover the worker under workers' compensation. Neither party indicated an investment by the worker in the firm or a related business, or the risk of the worker incurring a financial loss beyond the normal loss of compensation.

The firm did not make benefits available to the worker. The worker did not advertise his services or provide similar services for others during the same time period. Both parties reserved the right to terminate the work relationship without incurring a penalty or liability, and the relationship ended at the end of the contracted period.

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## Analysis

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, 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.

Factors that illustrate whether there was a right to control how a worker performed a task include training and instructions. In this case, the firm instructed the worker, showing it retained the right to change the worker's methods and to direct the worker to the extent necessary to protect its financial investment. The worker was required to submit weekly written reports. A requirement that the worker submit regular or written reports to the person or persons for whom the services are performed indicates a degree of control. Although the worker did not follow a routine schedule, if the nature of the occupation makes fixed hours impractical, a requirement that workers be on the job at certain times is an element of control. The worker performed his services at restaurants, bars, etc. Work done off the premises of the person or persons receiving the services indicates some freedom from control. However, this fact by itself does not mean that the worker is not an employee. The worker was required to perform his services personally, meaning he could not engage and pay others to perform services for the firm on his behalf. 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. These facts show that the firm retained behavioral control over the services of the worker.

Factors that illustrate whether there was 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. "Profit or loss" implies the use of capital by a person in an independent business of his or her own. Lack of significant investment by a person in facilities or equipment used in performing services for another indicates dependence on the employer and, accordingly, the existence of an employer-employee relationship. The firm paid the worker at an hourly rate on a weekly basis. Payment by the hour generally points to an employer-employee relationship. 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. These facts show that the firm retained control over the financial aspects of the worker's services.

Factors that illustrate how the parties perceived 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 were 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 as a product representative were a necessary and integral part of the firm's event planning and promotional business and enabled the firm to fulfill its contract with its client. 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. Although the firm did not provide benefits to the worker, both parties retained the right to terminate the work relationship without incurring a liability, a factor indicating an employer-employee relationship. These facts show that the firm retained control over the work relationship and services of the worker.

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.