

SS-8 Determination—Determination for Public Inspection

Occupation

03CRA Floral Designer

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 is seeking a determination of worker classification for services performed as a floral designer for the firm. The worker received a 1099-MISC from the firm for 2019. The worker states that they were previously classified as an employee of the firm and then they were reclassified as an independent contractor. The worker feels that they were misclassified by the firm as an independent contractor because they were not allowed to advertise their own business while performing job duties, the worker was required to answer the phone and help customers during their breaks, and they performed whatever tasks the firm owner assigned to them. The worker was required to sign an independent contractor agreement with the firm.

The firm states that it is a retail florist. The worker provided services for the firm as a trained floral designer. The firm classified the worker as an independent contractor because the worker provided their own tools, performed similar services for other firms, worked on their own schedule, and the worker preferred the flexibility of being an independent contractor when they were offered to be reclassified as an employee of the firm. The firm attached a copy of the worker's W-9, a letter explaining their classification of the worker, and pay documentation.

The firm states that the worker was previously trained and had retail skills. The worker was provided with job assignments in the form of floral orders. The firm owner was responsible for all problem resolution if the worker encountered any problems or complaints. The worker was required to provide the firm with completed order sheets. The worker would provide services for a few days a week, providing floral design services and assisting customers. All services were provided at the firm's shop premises. The worker was not required to attend any meetings. Helpers and substitutes were not applicable. The worker states that they were trained by the firm on how to design arrangements in a specific way, how to answer phones, and how to fill out phone orders. The firm owner provided the worker with orders as they came in, or the worker was told to clean and organize the shop. The firm owner determined the methods by which job assignments were performed. If the worker encountered any problems or complaints while working, they were required to contact the firm owner for problem resolution. There were no reports required of the worker. The worker performed services usually from 9am until 6:30pm, or whenever the firm owner needed the worker. The worker's routine included opening the shop, sweeping the sidewalk, checking for outgoing orders, answering the phone, helping incoming customers, tidying the shop, and watering the plants. The worker performed all services at the firm's shop. The worker was required to attend a design class that was unpaid. The firm required the worker to personally perform services. The firm owner was responsible for hiring and paying all helpers needed.

The firm states that they provided the worker with flowers, containers, and buckets. The worker provided a knife, cutters, and gloves. The worker did not lease any space, facilities, or equipment. The worker's expenses included tools and gloves. The firm did not reimburse any expenses. The worker was paid an hourly wage with no access to a drawing account. Customers paid the firm. The firm did not carry worker's compensation insurance on the worker. The worker's only economic loss would be the breakage of flowers. The firm and worker mutually agreed on the worker's hourly rate. The worker states that the firm provided bunch cutters, floral product, phones, the shop itself, and everything sold by the shop. The worker provided their floral knife. The worker did not lease anything and had no expenses. The firm paid the worker an hourly wage. Customers paid the firm for services provided. The worker had no exposure to economic loss or financial risk. The firm established the prices for all products as well as the worker's hourly wage.

The firm states that there were no benefits offered to the worker as they were an independent contractor. The relationship between the parties could be terminated by either party without liability or penalty. The worker performed similar services to other firms and did not need approval from the firm. There were no non-compete agreements in place. The worker was not a member of a union and did not advertise their services to the public. The worker was represented by the firm as a colleague. The work relationship ended when they agreed that the relationship was no longer working out. The worker states that they did not perform similar services for other firms. There were no non-compete agreement in place. The worker was not offered any benefits. The worker was not a member of a union and did not advertise their services to the public. The worker was not allowed to work from home or any other place besides the firm's premises. The worker was represented by the firm over the years as an employee performing services under the firm's name. The worker was fired, terminating 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.

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. In this case, the firm required the worker to personally perform services. Furthermore, the services performed by the worker were integral to the firm's business operation. The firm provided work assignments by virtue of the customers served, required the worker to report on services performed through order reports, and 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 its right to direct and control the worker; however, the facts evidence the firm retained the right to do so if needed.

Payment by the hour, day, 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 worker had no exposure to economic loss or financial risk, and no significant investment in the business. 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. 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 as a florist. 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. The worker was not allowed to represent their own business while working for the firm and was required to provide services on-site at the firm's premises. 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.