

SS-8 Determination—Determination for Public Inspection

Occupation

03MIS Miscellaneous Laborers

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 submitted a request for a determination of worker status in regard to services performed for the firm as a sales clerk. Tax reporting documents indicate the firm issued the worker Form 1099-MISC for 2014 through 2017. The work relationship ended in April 2018. The worker filed Form SS-8 as she believes she erroneously received Form 1099-MISC. The worker believes she was an employee as she was paid by the hour, punched a time clock, and could be fired. The firm told her what to do and when to do it.

The firm's response states it is a tobacco company that bags tobacco for resale. The worker bagged tobacco for resale and helped in the store occasionally. The worker was classified as an independent contractor as she signed an independent contractor agreement and she has been classified as an independent contractor for years. The worker could work when she wanted with no repercussions or penalties. An attempt was made to obtain a copy of the independent contractor agreement from the firm; however, the firm did not return the call.

The firm stated it initially told the worker to package tobacco in container sizes using a scale. After that, nothing other than where to put her completed work was told to the worker. Sheets were posted of any ongoing work, i.e. work assignments. Determining the methods used was not applicable as the job allowed variance. The store manager was contacted if problems or complaints arose. The store manager was responsible for resolution. Reports and meetings were not required. The worker's schedule was flexible. She had the opportunity to work one or two days a week. On average, she worked 15 to 16 hours. A lot of weeks she only worked 6 to 8 hours. Services were performed at the firm's location. The firm required the worker to personally perform services. Hiring substitutes or helpers was not applicable. The worker stated the firm instructed her to show up on time and punch the time clock. Work assignments were provided verbally. The firm determined the methods by which assignments were performed and it assumed responsibility for problem resolution. The worker's daily routine consisted of punching in when arriving, doing the tasks assigned by the firm, and punching out when leaving. The firm was responsible for hiring substitutes or helpers.

The firm stated it provided scales, bags, gloves, and tags. The worker could have used her own equipment. The worker did not lease equipment, space, or a facility. Any expenses incurred by the worker were not reimbursed by the firm. Customers paid the firm. The firm paid the worker an hourly rate of pay; a drawing account for advances was never utilized by the worker. The firm did not carry workers' compensation insurance on the worker. The worker's economic loss or financial risk related to use of her own equipment, if used. The worker did not establish the level of payment for the services provided or the products sold. The worker stated the firm provided all supplies, equipment, and materials. She did not incur expenses in the performance of services for the firm. She did not incur economic loss or financial risk.

The firm stated the work relationship could be terminated by either party without liability or penalty. It is unknown if the worker performed similar services for others. An agreement prohibiting competition between the parties was not applicable. The worker advertising was not applicable. The firm represented the worker as a sub-contractor to its customers. The work relationship ended when the worker quit for another job. The worker stated she did not perform similar services for others or advertise. The firm represented her as an employee to its customers. Services were performed under the firm's business name. The worker quit for another job where she would receive a Form W-2.

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, the firm's statement that the worker was an independent contractor pursuant to a written 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. 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 initially provided specific instruction related to work assignments. It 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 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, 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. 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 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 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.