

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 from May 2017 to February 2018. The work done by the worker included assembling and preparing sandals for online sales. The firm issued the worker Form 1099-MISC for 2017. A copy of the 2018 tax reporting document was not provided for our review. The worker filed Form SS-8 as she believes she erroneously received Form 1099-MISC.

The firm's response states it is a handmade leather goods and sandals business. The worker was engaged to make leather sandals. The worker was classified as an independent contractor as she was hired by others at the temporary remote location. Services required no oversight from the firm. The worker was temporarily hired during the peak sandal season and she did not go through any formal evaluation process. She finished orders prior to the location closing in early 2018. There was no written agreement between the parties.

The firm stated it did not provide specific training or instruction to the worker. On-site skilled workers trained the worker. Customer orders generated work assignments. The worker determined the methods by which assignments were performed. The firm was contacted if problems or complaints arose. The firm assumed responsibility for resolution. Reports and meetings were not required. The worker's schedule varied based on customer orders and volumes needed. Services were performed at a location which was not the firm's principal location. The firm required the worker to personally perform services. The location where services were performed hired substitutes or helpers. The firm paid substitutes or helpers. The worker stated she received training in connection with sandal assembly. Her work day consisted of 9 – 5, with 30 minutes for lunch. The amount of work varied based on the number to be produced for the week. Services were performed at a factory.

The firm stated it provided supplies, materials, and some equipment. The worker did not provide supplies, equipment, or materials. The worker did not lease equipment, space, or a facility. The worker did not incur expenses in the performance of services for the firm. Customers paid the firm. The firm paid the worker an hourly rate of pay; a drawing account for advances was not allowed. The firm did carry workers' compensation insurance on the worker. The worker did not incur economic loss or financial risk. On-site workers recommended the level of payment for the services provided. The worker stated the firm provided the factory and machinery. The firm determined the level of payment for the services provided or the products sold.

The firm stated the work relationship could be terminated by either party without incurring liability or penalty. It is unknown if the worker performed similar services for others or advertised. She was not restricted in performing services for others. The firm represented the worker as a member of its team. Services were performed under the firm's business name. The work relationship ended when sandal production moved to another state due to the difficulties in dealing with remote sandal production. The worker stated she did not perform similar services for others or advertise. The firm represented her as an employee to its customers.

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 services performed by the worker were integral to the firm's business operation. The firm arranged for the worker to be trained, it provided work assignments by virtue of its customer orders, and 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 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. As acknowledged by the firm, the worker did not incur economic loss or financial risk. 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.