

SS-8 Determination—Determination for Public Inspection

Occupation

Construction/Technical Services/Trades

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 firm is a retail furniture and mattress store. The firm engaged the worker as a backroom laborer from 04/2018 to 04/2019. This was pursuant to a written agreement between the parties. The worker had previously performed services for the firm through a temp. agency. He was then hired directly by the firm.

The firm's perspective was the worker knew his status as an independent contractor pursuant to the contract labor agreement he signed. They stated the worker could work for other firms and could use his own methods for product assembly and moving furniture. They indicated the services to be provided were on an as-needed basis. Therefore, their treatment of the worker as an independent contractor was accurate.

The worker's perspective was he was given a schedule, specific instructions about the services to be performed and was paid by the hour. He was also provided a uniform to be worn provided to him from the firm.

The firm provided instructions, and supervision as to the details and means by which the worker was to perform the services. The worker received his instructions from the firm's manager regarding the services to be performed. According to the worker, he received a schedule from the firm. He was required to clock in and out using the firm's time clock. He would unload trucks, assemble furniture as needed, move furniture around the sales floor according to the managers instructions, and assist the firm's customers with loading furniture in their cars. The worker stated he received employee reviews while working at the firm. The reviews were completed by the firm's district manager. The firm detailed the worker was given flexible assignments and could work as much as he wanted to. His schedule could vary depending on the truck's delivery schedule. They also indicated when there were no deliveries the worker would come in to assemble furniture or move the store's inventory. He received regular remuneration for his services. The firm was responsible for problem resolution. The worker was not required to submit any reports. He performed the services on the firm's premises. The worker was not required to attend any meetings. The relationship between the parties was continuous, as opposed to a one-time transaction. The nature of this relationship contemplated that the worker would perform the services personally. The worker worked exclusively and on a continuing basis for the firm. His services were an integral and necessary part of the services the firm provided to its customers. The worker stated the firm would hire and pay any substitutes or helpers. The firm indicated the hiring and paying of substitutes or helpers was not applicable.

The worker did not furnish any of the tools or equipment used in performing the services. The worker did not lease equipment. The firm determined the fees to be charged. The worker did not incur any significant business expenses. The worker was paid an hourly wage. The firm did not allow the worker a drawing account, or advances against anticipated earnings. The firm's customers paid the firm for the services that were provided by the worker. The firm stated it did carry worker's compensation insurance on the worker. The worker did not have a substantial investment in equipment or facilities used in the work and did not assume the usual business risks of an independent enterprise.

The worker was not eligible for sick pay, vacation pay, health insurance, or bonuses. Either party could terminate the work relationship at any time without incurring a penalty or liability. There was not a "non-compete" agreement between the parties. The worker was not a member of a union. All work produced became the property of the firm. The firm indicated that all products the worker assembled were placed on the firm's sales floor. According to internal research, the worker did not perform the services for others. He did not advertise his services to the public or maintain an office, shop, or other place of business. The relationship between the parties ended. The worker stated the store's location closed whereas the firm stated the worker quit.

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.

In determining whether an individual is an employee or an independent contractor under the common law, all evidence of both control and lack of control or independence must be considered. We must examine the relationship of the worker and the business. We consider facts that show a right to direct or control how the worker performs the specific tasks for which he or she is hired, who controls the financial aspects of the worker's activities, and how the parties perceive their relationship. The degree of importance of each factor varies depending on the occupation and the context in which the services are performed.

The firm's contention that the worker was treated as an independent contractor pursuant to an agreement for him to be treated as such is without merit. It is the firm's responsibility to treat workers according to federal employment tax guidelines and law. Neither the firm nor the worker has the right to decide whether the worker should be treated as either an independent contractor or an employee. Worker status is dictated by the characteristics of the work relationship. If the work relationship meets the federal employment tax criteria for an employer/employee relationship, federal tax law mandates that the worker be treated as an employee.

A worker who is required to comply with another person's instructions about when, where, and how he or she is to work is ordinarily an employee. This control factor is present if the person or persons for whom the services are performed have the right to require compliance with instructions. Some employees may work without receiving instructions because they are highly proficient and conscientious workers or because the duties are so simple or familiar to them. Furthermore, the instructions, that show how to reach the desired results, may have been oral and given only once at the beginning of the relationship.

A continuing relationship between the worker and the person or persons for whom the services are performed indicates that an employer-employee relationship exists. A continuing relationship may exist where work is performed in frequently recurring although irregular intervals.

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.

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. 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.

Based on the common-law principles, the firm had the right to direct and control the worker. The worker shall be found to be an employee for Federal tax purposes.

The firm can obtain additional information related to worker classification online at www.irs.gov; Publication 4341.