Form **14430-A**
(July 2013)

Department of the Treasury - Internal Revenue Service

SS-8 Determination—Determination for Public Inspection

Occupation	Determination:
04MAN Managers/Supervisors	[X] Employee [ ] Contractor
UILC	Third Party Communication: [X] 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, an assistant manager and barista, submitted a Form SS-8 related to services he provided in 2017 and 2018 to the Firm, a confectionery baking company. The Worker attached copies of TY2017 and TY2018 forms 1099-MISC the Firm issued him. The Worker believes he was the Firm's employee and should have been issued a Form W-2. The Firm submitted a responsive Form SS-8, without attachments, and maintains the Worker was an independent contractor but that the Firm had asked him in 2018 to . The parties agree the Worker didn't provide services for the Firm in any capacity before performing the work related to this case and they didn't have a written agreement about the Worker’s services to the Firm.

According to the Firm, the Worker had the experience it needed and "...actually trained us in many respects." The Firm originally hired the Worker for the Firm's coffee bar business because of his barista experience. When the Firm's store manager left, the Firm offered the Worker the assistant manager job. The Worker maintains the Firm trained him in selling and ringing up orders, sales language, Firm brand representation, cash and inventory management, customer order intake, cleaning, and end of shift tasks. The Firm states the Worker got assignments through set goals and a written job description for the assistant manager role. The Firm states the Worker chose the methods to perform his assignments but the Firm's owners would also direct the Worker; the Worker generally agrees the Firm's owners determined those methods. The parties agree the Firm required the Worker to contact the Firm's owner if problems or complaints arose, and the owner was responsible for resolving them. The Firm didn't note any reports it required of the Worker; the Worker states the Firm required him to make cash/drawer and store inventory reports.

The Firm describes the Worker’s daily routine in his assistant manager role as “…3-5 days a week.” The Worker describes his routine as clocking in, opening the cash drawer, opening the store, taking and fulfilling in-person orders, packaging on-line orders, restocking the sales floor, tracking inventory, cleaning the store and equipment, taking out trash, and clocking out. The parties agree the Worker spent 100% of his workday at the Firm. The Worker states the Firm’s owner scheduled the Worker’s hours based on availability.

According to the Firm, as assistant manager the Worker was supposed to hold meetings but they “never got to that point.” The Worker did not respond to the question of required attendance at meetings. The parties agree the Firm required the Worker to personally perform the services relevant to this determination and that only the Firm’s owner could approve, hire, and pay any substitutes or helpers.

The parties generally agree the Firm provided the location and equipment necessary for the Worker to do his job. The Firm submits the Worker provided a café manual template it would use to build store policies and procedures. The Worker states he didn’t provide any supplies, equipment, materials, or property to do his work for the Firm. The parties agree the Worker didn’t lease equipment, space, or a facility. The Firm states the Worker incurred expenses for “driver time/car, health insurance, cell phone, etc.”, and it didn’t reimburse the expenses. The Worker submits he didn’t incur expenses working for the Firm.

As to the type of pay the Worker received, the Firm stated “1099-MISC.” The Worker maintains the Firm paid him an hourly wage. The parties agree the Worker wasn't allowed a drawing account and customers paid the Firm. The Firm didn't carry worker’s compensation insurance on the Worker.

On the question of what economic loss or financial risk the Worker could have incurred working for the Firm -- beyond normal loss of wages -- the Firm states “Reputation among the cafe community,” while the Worker states “none.” As to whether the Worker set the level of payment for services provided or products sold, the Firm states “Product sold is determined by company; consultant pay by mutual agreement.” Presumably the Firm is referring to itself as “company”, and to the Worker as “consultant.” The parties generally agree the Firm didn’t make benefits available to the Worker, their working relationship could be terminated by either party without incurring liability or penalty, and the Worker wasn't a union member. Neither party claims the Worker provided similar services for others during the relevant time period.

Neither party contends there was any non-compete agreement between them during or after the Worker performed services for the Firm. The Firm states there was a signed confidentiality agreement between the parties, but the Firm provided no evidence of such an agreement. For the limited purpose of this determination we will accept the Firm's contention there was such a confidentiality agreement. The Firm states it doesn’t know if the Worker does or did any advertising; the Worker maintains he did none. The Worker states the Firm represented him to customers as “employee working for [FIRM NAME].” The Firm states it eventually asked the Worker, in 2018, to join the Firm as a W-2 employee but the Worker chose not to. The parties generally agree their working relationship ended when the Worker quit.

Analysis

The relationship of employer and employee generally exists when the person or entity the worker is providing services to has the right to control and direct what the worker does and how the worker does it. It isn't necessary for the person or entity to actively direct or control the worker, only for it to have the right to do so.

It's essential for workers and the individuals or entities they're working for to understand that if an employer-employee relationship exists, any oral or written contract, agreement, mutual intent, or understanding between the parties that designates the worker as an independent contractor must be disregarded when determining worker classification for federal employment tax purposes. In this context, under the required common law standard, the actual working relationship between the parties is what matters. IRC 31.3121(d)-1(c).

The Firm initially hired the Worker for his barista experience and ability to help with its coffee bar business and then, at some point, made him an assistant manager working three to five days a week. The Firm did not describe the Worker's daily routine or attach a copy of the job description it referred to, but the duties the Worker describes sound typical for an assistant manager role in a small retail operation -- clocking in, opening the store, taking and fulfilling customer orders, restocking, inventory, cleaning, taking out the trash, and clocking out at shift's end. At face value, the combined nature of these functions – which the Firm required the Worker to perform personally -- lead to a reasonable conclusion that the Worker's services were integral to the Firm's business operation. These facts weigh heavily toward the existence of an employer-employee relationship.

The Firm was ultimately responsible for the performance, quality, and standard of the Worker's service and for the satisfaction of the Firm's customers – its business success depended on its ability to satisfactorily serve its customers so they would continue purchasing the Firm's products and spread positive reviews. How the Worker conducted the Firm's business could make or break the Firm's reputation and, ultimately, its business survival. This gave the Firm the right to direct and control the Worker in order to protect its financial investment, business reputation, and customer relationships. Such integration of the Worker's services into the Firm's business operations points to the Worker being subject to the Firm's direction and control and is highly indicative of an employer-employee relationship.

With the Firm's shift-based hourly pay arrangement, the Worker could not realize a profit or incur a loss. Neither party presents evidence or even asserts the Worker invested capital or could have incurred economic loss or financial risk working for the Firm. The possibility that the Worker's reputation among the café community might be impacted doesn't represent a measurable economic loss or financial risk for the Worker – risk to reputation is inherent in any working relationship, where there's always the possibility one party won't have much good to say about the other, especially if things ended on less than favorable terms. While workers who can realize a profit or suffer a loss as a result of their services are generally independent contractors, workers who cannot are generally employees. The facts here are indicative of an employer-employee relationship.

Although the Firm refers to him as a consultant, the Worker was not providing services to the Firm through engagement in an independent enterprise; rather, the services performed by the Worker as the Firm's Assistant Manager were a necessary and integral component of the Firm's activities and mission. There is no evidence in the parties' submissions or our research suggesting the Worker performed similar services for others as an independent contractor or advertised business services to the general public during the term of his work relationship with the Firm. These facts also point to an employer-employee relationship.

As noted above, common law factors are considered when examining worker classification issues. Based on the evidence and facts presented and researched, this analysis concludes the Firm had the right to direct and control the Worker to the degree necessary to establish the Worker was a common law employee of the Firm during the relevant time period, and not an independent contractor operating a trade or business. Accordingly, the Worker is classified as an employee of the Firm for employment tax purposes.

The Firm can obtain additional information related to worker classification on-line at www.irs.gov; Publication 4341.