

SS-8 Determination—Determination for Public Inspection

Occupation

04MAN.20 Manager

Determination:

☒ Employee

☐ Contractor

UILC

Third Party Communication:

☒ None

☐ Yes

Facts of Case

The firm is in the business of operating a restaurant and bar. The worker was engaged as a general manager. He received a Form 1099-MISC for his services in 2013 and 2014. There was no written agreement.

Both the firm and the worker agreed that the worker was not trained. The worker noted that he received his work assignments from the firm. However, the firm noted that he created his own assignments and schedule but did indicate that the worker was engaged to hire, train, manage, and set the employees' work schedules. In addition, he was to order food, drink and supplies as well as address employee and customer needs. His duties also included keeping the firm's owner informed of the restaurant's needs. Each indicated that the other determined the methods by which the assignments were performed. The worker noted that he would contact the firm if there were issues and problems to resolve; the firm noted that the worker would handle any issues himself. The worker submitted sales and orders into the computer for the firm to access; the firm noted that the reports were verbal and only periodically. The worker's routine consisted of working from opening to closing, inputting orders into the computer, opening/closing the restaurant, helping in the kitchen, seating patrons, and processing sales receipts. The firm indicated that it didn't know the worker's work schedule. Both parties agreed that the worker worked at the firm's restaurant; however the firm added the community, home or where necessary. Both agreed that there were some meetings. The worker was to provide the services personally and both agreed that the worker hired other workers with the firm paying those workers.

Both the firm and the worker agreed that the firm provided the restaurant, the equipment, tools and supplies with the firm mentioning that the worker provided his own knives. Both parties agreed that the worker was paid a salary on a bi-weekly basis with the firm indicating that it was based on an annual amount. Both agreed that the customer paid the firm. The firm indicated that the worker set the menu prices; but the worker noted that the firm established the level of payment for services.

Both the firm and the worker agreed that there were no benefits and that either party could terminate the relationship without incurring a liability. The worker did not perform similar services for others though the firm indicated that he did with the firm's approval. The relationship ended when the worker's services were terminated as a manager.

Analysis

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. The relationship of the worker and the business must be examined. 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 should be considered. As is the case in almost all worker classification cases, some facts point to an employment relationship while other facts indicate independent contractor status. The determination of the worker's status, then, rests on the weight given to the factors, keeping in mind that no one factor rules. The degree of importance of each factor varies depending on the occupation and the circumstances.

Factors that illustrate whether there is a right to control how a worker performs a task include training and instructions. In this case, the firm retained the right to change the worker's methods and to direct the worker to the extent necessary to protect its financial investment. The firm provided the worker his assigned duties as a general manager such as hiring/firing employees, scheduling the employees, ordering supplies, and reporting the needs of the business operation to the firm. The worker provided his services for most of the restaurant's open hours, essentially full-time. The term "full-time" may vary with the intent of the parties and the nature of the occupation since it does not necessarily mean working an eight hour day or a five or six day week. If the worker must devote substantially full-time to the business of the person or persons for whom the services are performed, such person or persons have control over the amount of time the worker spends working and, therefore, the worker is restricted from doing other gainful work. An independent contractor, on the other hand, is free to work when and for whom he or she chooses. Even though the time period that the worker worked for the firm was a short duration, his services were continuous throughout that time period. 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.

Factors that illustrate whether there is a right to direct and control the financial aspects of the worker's activities include significant investment, unreimbursed expenses, the methods of payment, and the opportunity for profit or loss. In this case, the worker did not invest capital or assume business risks, and therefore, did not have the opportunity to realize a profit or incur a loss as a result of the services provided. The worker received a bi-weekly amount of compensation and had no other economic risk. The firm had the investment in the restaurant operation. The worker may have provided some tools of his trade (knives) but that would not be considered a significant investment. 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. There were no benefits and there was no written agreement. In this case, the worker's services as a general manager were not an indication of an independent business venture undertaken by the worker but rather the manager services were part of the necessary activities of the firm's restaurant operations. 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.

The firm indicated that the worker was fully aware of his status and how he was going to receive a Form 1099 as well as be responsible for his taxes. However, in *Bartels v. Birmingham*, 332 U.S. 126, 1947-2 C. B. 174, the Supreme Court stated that whether there is an employment relationship is a question of fact and not subject to negotiation between the parties.

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.