

SS-8 Determination—Determination for Public Inspection

Occupation

05CSI Personal Service Providers

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 in the business of assisting non-profit organizations to raise money and awareness through special events and consulting. The worker was engaged as a hospitality manager who was also assigned other duties as well. He received a 2015 Form 1099-MISC for his services during that time period as well as a Form 1099-MISC in 2016 and 2017 for monies due. There was a written agreement.

According to the worker, the firm provided training and instructions as he provided additional duties in addition to those of a hospitality manager for which he was initially hired; the firm indicated that it did not provide any training or instructions. The firm assigned the worker his tasks in advance of the work day via email; he was also assigned some work during the workday itself. The firm management determined the methods by which the assignments were performed and would be contacted if any problems or issues arose. Though the firm indicated that the worker did not submit reports, the worker was required to sign-in/out during work shifts at the command center and report on hours worked as well as provide verbal and written reports to the firm management prior to, during and after work shifts. He also submitted reimbursement reports/receipts. The worker's work hours varied but usually started in the morning following the firm-designated routine. He worked at firm-assigned work locations as well as the firm's warehouse, and ran errands. The worker was to provide the services personally. The firm disagreed, however, acknowledged that it interviewed the worker for the hired position.

The firm provided all supplies, equipment, required uniforms, nametags, and walkie-talkies. All business and travel expenses were reimbursed upon the submission of receipts. The firm, however, noted that they supplied only towels with the worker supplying everything. He was paid by the hour through the firm's payroll account and had no other economic risk other than the loss of his compensation. The worker was allowed a drawing account for advances and was given authority to purchase supplies. The customer paid the firm. The worker did not establish the level of payment for services.

Both the firm and the worker agreed that there were no benefits though the worker mentioned that there were unpaid personal days and withheld insurance deductions. Either party could terminate the relationship without incurring a liability. The worker did not perform similar services for others during the same time period. According to the worker, the firm represented him as an employee team member. The firm, however, indicated that the worker was a hospitality coordinator who had previous experience. The relationship has ended.

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. While the worker may not have received any extensive training or instructions, he worked under the firm's management that assigned him duties as well as the days, hours, and locations where his services were needed. Based on the worker's previous experience, he was initially hired as hospitality manager to attend to the specific needs/requests of artists engaged by the firm for various events. While the establishment of set hours of work by the person or persons for whom the services are performed is a factor indicating control, if the nature of the occupation makes fixed hours impractical, a requirement that workers be on the job at certain times is an element of control. The firm remained obligated to provide these negotiated services.

The worker reported on his various activities and hours throughout the time period involved; he worked when needed and assigned tasks. The worker did not provide his services on a one-time basis but on a continuous basis, when needed, throughout the time period involved. 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 was contacted when needed, and received an hourly rate of pay; he had no other economic risk other than the loss of his compensation. He was reimbursed for his receipted expenses and had no significant investment involved in providing his services. 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.

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 was a written agreement. However, the firm's belief that the worker was an independent contractor pursuant to an 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. So while it is acknowledged that the worker signed the agreement, 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.

The worker was engaged as a hospitality manager who provided other services needed by the firm. The worker may have had experience in this line of work, however, that did not automatically mean he was self-employed as many employees bring acquired skills from job to job. When doing so, the worker was not engaged in an separate business venture. His services instead were essential and integral to the firm's continuing 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. In this case, the worker's services were provided and promoted by the firm to satisfy the special requests from artists obtained by the firm for their events.

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.

Please see Publication 4341 for guidance and instructions for firm compliance.