

**SS-8 Determination—Determination for Public Inspection**

Occupation

05FIW Food Industry Worker

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**

Information provided indicated the firm is a café and bar establishment. The firm indicated the worker was employed by the firm as part time cook and waiter. Services were performed in tax years 2017 and 2018. The firm reported the wages on Form 1099-MISC for tax year 2017, despite the fact pay stubs show the firm withheld applicable tax withholdings. The firm had issued W-2 pay documents for tax years 2015 and 2016. The firm stated he was trained how to wait tables. The owner of the firm gave work assignments, determined how the work was performed and was responsible for resolving any issues or complaints.. The firm stated the worker was hired to wait tables, the asked if he could be allowed to cook also, which the firm agreed to. All work was performed on the firm premises. The firm indicated they provided all equipment, materials and supplies. The worker provided any items he required for his [REDACTED]. The worker was paid by the hour, plus tips. The customer pays the worker, all money except for his tips were turned into the firm. The firm stated he was represented as an employee. The firm stated he left to go work for his parents.

The worker agreed he was cook, dishwasher and waiter. He indicated he sometimes opened and closed the diner. All services were performed on firm premises. He feels hew as an employee, as check stubs in 2017 shows taxes were withheld. He performed services previously in 2015 and 2016 and received Form W-2. He agreed he was paid by the hour. He indicated he was laid off due the dispute over the issuance of Form 1099-MISC.

**ANALYSIS**

The question of whether an individual is an independent contractor or an employee is one that is determined through consideration of the facts of a particular case along with the application of law and regulations for worker classification issues, known as "common law." Common law flows chiefly from court decisions and is a major part of the justice system of the United States. Under the common law, the treatment of a worker as an independent contractor or an employee originates from the legal definitions developed in the law and it depends on the payer's right to direct and control the worker in the performance of his or her duties. Section 3121(d)(2) of the Code provides that the term "employee" means any individual defined as an employee by using the usual common law rules.

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.

Therefore, your statement 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.

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## Analysis

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We have applied the above law to the information submitted. 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.

Evidence of control generally falls into three categories: behavioral control, financial control, and relationship of the parties, which are collectively referred to as the categories of evidence. In weighing the evidence, careful consideration has been given to the factors outlined below.

Factors that illustrate whether there is a right to control how a worker performs a task include training and instructions. In this case, you retained the right to change the worker's methods and to direct the worker to the extent necessary to protect your financial investment.

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.

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 your business. Both parties retained the right to terminate the work relationship at any time without incurring a liability.

## CONCLUSION

Based on the above analysis, we find this to be an erroneous misclassification of employment. The worker performed services for the firm from 2015 through 2018. The firm had originally issued Form W-2 and proof was provided tax withholdings had been taken out of his checks in 2017. Despite that the firm issued Form 1099-MISC. There appeared to have been no changes in services provided. The worker had continued to perform services as a waiter and cook. The firm stated in their response he was an employee. We find the worker to have been an employee for all services performed.