

SS-8 Determination—Determination for Public Inspection

Occupation 05FIW Food Industry Workers	Determination: <input checked="" type="checkbox"/> Employee <input type="checkbox"/> Contractor
UILC	Third Party Communication: <input checked="" type="checkbox"/> None <input type="checkbox"/> 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 limited service fast food restaurant offering catering services. The worker is engaged by the firm to deliver food from vendors. The firm reported the worker's remuneration on Form 1099-MISC for 2017. There is no indication that the firm is currently withholding taxes from the worker's pay.

Information from the parties supports that the firm relies upon the worker's prior knowledge to perform his services. The firm provides the worker with his work assignments. The firm's manager determines the methods by which the worker performs his services and is responsible for resolving any problems or complaints that may occur. The worker does not have fixed hours or schedule. He performs his services on the firm's premises. The firm stated that the worker is not required to perform his services personally. The firm pays any substitutes or helpers.

The worker utilizes his own car. The firm reimburses the worker for his fuel expenses. The firm pays the worker on a piece work basis. It covers the worker under workers' compensation. The firm establishes the level of payment for products sold. Neither party indicated an investment by the worker in the firm or a related business, or the risk of the worker incurring a financial loss beyond the normal loss of compensation.

The firm does not make benefits available to the worker. Both parties reserve the right to terminate the work relationship without incurring a penalty or liability. The worker does not advertise his services or provide similar services for others during the same time period.

Analysis

Factors that illustrate whether there is a right to control how a worker performs a task include training and instructions. In this case, although the firm relies upon the worker's prior knowledge to perform his services, it is responsible for resolving any problems or complaints that may occur, showing it retains the right to change the worker's methods and to direct the worker to the extent necessary to protect its financial investment. The firm's statement that the worker performs services on an as-needed basis and is therefore, an independent contractor, is without merit as both employees and independent contractors can perform services when the needs of a business warrants. The firm stated that the worker is not required to perform his services personally; however, there is no indication that the he can engage and pay others to perform services for the firm on his behalf, which presumes that the person or persons for whom the services are performed are interested in the methods used to accomplish the work as well as in the results. These facts show that the firm retains behavioral control over the services of the worker.

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, does not have the opportunity to realize a profit or incur a loss as a result of the services provided. Lack of significant investment by a person in facilities or equipment used in performing services for another indicates dependence on the employer and, accordingly, the existence of an employer-employee relationship. "Profit or loss" implies the use of capital by a person in an independent business of his or her own. There is no evidence to suggest the worker's vehicle was purchased exclusively for business purposes. Presumably this item is also used by the worker for his personal needs; therefore, it is not considered a significant business investment. The firm pays the worker for services rendered, showing the worker does not risk a loss beyond the normal loss of wages. These facts show that the firm retains control over the financial aspects of the worker's services.

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 performs his services on a continuing basis. 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. The worker is not engaged in an independent enterprise, but rather the delivery and related services performed by the worker are a necessary and integral part of the firm's restaurant and catering business. 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. Although the firm does not make benefits available to the worker, both parties retain the right to terminate the work relationship without incurring liability or penalty, a factor indicating an employer-employee relationship. These facts show that the firm retains control over the work relationship and services of the worker.

Based on the above analysis, we conclude that the firm has the right to exercise direction and control over the worker to the degree necessary to establish that the worker is a common law employee, and not an independent contractor operating a trade or business.