

SS-8 Determination—Determination for Public Inspection

Occupation

05FIW Food Industry Workers

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 worker submitted a request for a determination of worker status in regard to services performed for the firm from September 2018 to February 2019 as a kitchen assistant. The firm issued the worker Form 1099-MISC for 2018. The worker filed Form SS-8 as they believe they received Form 1099-MISC in error because they worked the firm's specific schedule under supervision using the firm's equipment and supplies.

The firm's response states it is an on-line catering company. The work provided by the worker was kitchen assistant. The worker was requested to provide assistance in the kitchen during the firm's busy holiday catering season. The firm states that the worker was an independent contractor because they worked on a part-time, temporary basis. The firm provided a signed disclosure agreement between the firm and the worker for our review.

The firm states that the worker received no specific training and was instructed to help the firm during the busy holiday catering season. The firm states that work assignments were broad and within the scope of what was required for assistance in the kitchen. The firm states that the worker Determined the methods by which job assignments were performed. If the worker experienced any problems or complaints during their job responsibilities, they were required to contact the owner for problem resolution. The firm states that there were no reports required of the worker to provide for the firm. The firm states that the worker's schedule was centered around the holiday season and working part-time to assist during the busy catering schedule of the firm. The worker was required to perform services at the firm's premises and no meetings were required to attend. The firm states that the worker was not required to perform all services personally. If helpers or substitutes were required, the firm was responsible for hiring and paying the assistants. The worker states that they received specific instruction on the preparing of food, which varied each week with the menu. The worker states that they received work assignments from the firm by text message, handwritten and typed lists, and verbally. The worker provided a copy of a text message exchange between the firm and the worker to demonstrate how this was done, as well as some of the lists of tasks they had been given. The worker states that the owner of the firm determined the method by which job assignments were performed unless the worker knew of a better way to perform the duties. The worker states that it was a rare situation that this would be the case. The worker states that they would receive text messages from the firm's owner while they were performing their job duties in the kitchen inquiring about how the job was going. The worker states that their hours varied and could change at a moment's notice but were often from 11 a.m. until 5 p.m., Monday through Wednesday. They would usually start their day by unloading supplies and ingredients from the firm owner's car, prepping the food, and then finish their day by cleaning up the kitchen. The worker states that 95% of the time was spent in the firm's kitchen, and the other time was spent transporting food or running to the grocery store for ingredients. The worker states that they were required to attend one unpaid disciplinary meeting, and they were required to perform all services personally.

The firm states that they provided all of the materials, supplies and equipment for the job duties and the worker did not have to provide anything. The worker did not have to lease space, equipment or facilities for their job responsibilities. The worker did not incur any expenses in the performance of their job. The worker was paid an hourly wage and did not have access to a drawing account for advances. The customer would pay the firm, and the firm set the level of payment for all services rendered. The firm did not carry worker's compensation insurance on the worker. The worker was not exposed to any economic loss or financial risk during their job duties. The worker states that the firm provided all kitchen tools/appliances, an apron, ingredients, kitchen space, cleaning supplies, and sometimes bandages for the worker's duties. The worker only had to provide a hat and sometimes bandages. The worker was paid an hourly wage and provided timesheets as evidence of how they would record their hours for the firm. The worker sometimes incurred ingredient or licensing expenses but was reimbursed by the firm for these expenses. The worker did not have any exposure to economic loss or financial risk beyond the possibility of bodily harm during their job duties. The worker states that the firm owner set the level of payment for all catering services rendered.

The firm states that they did not offer the worker any benefits. The work relationship between the parties could be terminated by either party at any point without incurring loss or liability. The firm states that the worker performed similar services for other firms at the time they worked for the firm and they did not require approval from the firm to do so. The firm states that there were no agreements prohibiting competition between the firm and the worker since the worker's role performing services for the firm was temporary. The worker was not a member of a union and the worker did not advertise their services to the public. The firm states that they represented the worker to their clients as temporary help. The work relationship ended when the job was completed. The worker states that they did not perform similar services for any other firm at the time they worked for the firm. The worker states that they did not advertise their services to the public. The worker states that all services they performed were under the name of the firm. The work relationship ended when the worker quit after a conversation about how they would be classified as an independent contractor. The worker provided a copy of this text message conversation for our consideration.

Analysis

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.

Section 31.3121(d)-1(a)(3) of the regulations provides that if the relationship of an employer and employee exists, the designation or description of the parties as anything other than that of employer and employee is immaterial. Thus, if an employer-employee relationship exists, any contractual designation of the employee as a partner, coadventurer, agent, or independent contractor must be disregarded.

Therefore, a statement that a worker is an independent contractor pursuant to a written or verbal 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. Furthermore, whether there is an employment relationship is a question of fact and not subject to negotiation between the parties.

If the services must be rendered personally, presumably 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. In this case, the firm required the worker to personally perform services. Furthermore, the services performed by the worker were integral to the firm's business operation of catering. The firm provided work assignments by virtue of the customers served, required the worker to report on services performed through text messages, and assumed responsibility for problem resolution. These facts evidence the firm retained the right to direct and control the worker to the extent necessary to ensure satisfactory job performance in a manner acceptable to the firm. Based on the worker's education, past work experience, and work ethic the firm may not have needed to frequently exercise its right to direct and control the worker; however, the facts evidence the firm retained the right to do so if needed.

Payment by the hour, day, 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. In this case, the worker did not invest capital or assume business risks. The firm provided all materials, supplies and equipment for the job responsibilities of the worker. The term "significant investment" does not include tools, instruments, and clothing commonly provided by employees in their trade; nor does it include education, experience, or training. Based on the hourly rate of pay arrangement the worker could not realize a profit or incur a loss.

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 the firm's business. Both parties retained the right to terminate the work relationship at any time without incurring a liability. There is no evidence to suggest the worker performed similar services for others as an independent contractor or advertised business services to the general public during the term of this work relationship. The classification of a worker as an independent contractor should not be based primarily on the fact that a worker's services may be used on a temporary, part-time, or as-needed basis. As noted above, common law factors are considered when examining the worker classification issue.

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.

The firm can obtain additional information related to worker classification online at www.irs.gov; Publication 4341.