

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 January 2018 to December 2019 as a tasting room worker. 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 had a set schedule and were required to clock in and out. There was no written agreement between the parties.

The firm's response states it is a family-owned winery. The work provided by the worker was that of a bartender. The worker was requested to perform bar-tending duties and run wine tastings for the firm's customers. The firm states that the worker was part-time and not on contract.

The firm states that they did not provide the worker with any specific training or instruction. The worker received work assignments as needed by the firm. The firm states that the firm owner determined the methods by which job assignments should be performed. The worker was required to contact the firm's owner for problem resolution in the event that they encountered any problems or complaints during job duties. The worker was not required to submit any reports to the firm. The firm states that the worker was required to work 6 to 8 hours on a daily basis. The worker was not required to attend any meetings. The worker was required to perform all services personally. The firm states that if helpers or substitutes were needed, the firm's owner would be responsible for hiring the additional help. If the worker paid for any substitutes or helpers, the firm reimbursed the worker for the payments. The worker states that they were taught a variety of job duties involved with wine tastings, labelling wines, taking care of the facility, and greeting customers. The worker received job assignments from the firm's management, who also determined the methods by which job assignments should be performed. The worker was required to contact the firm's manager if there were any problems that arose during job duties. The worker was required to fill out time sheets for the firm as well as wine inventories. The worker would start their day by opening the winery to the public, determining wine suitability for tastings, performing housekeeping as needed, taking care of guests and wine tastings, and selling items on behalf of the firm. The worker had a key that was given to them by the firm in order to open and close the winery. The worker performed all services at the firm's location, 95% of the time in the retail store of the winery and the remaining 5% of the time in the garage and vineyard. The worker was not required to attend any formal meetings but would briefly meet with the managers to share information as needed. The worker was required to perform all services personally. All helpers and substitutes were hired and paid by the firm.

The firm states that they provided the worker with all of the goods to be sold during job duties and the worker did not have to provide anything for their job. The worker did not have to lease space, facilities, or equipment. There were no expenses incurred by the worker during their job duties. The worker was paid an hourly wage and did not have access to a drawing account for advances. Customers would pay the worker for the services rendered and the worker would surrender the entire payment to the firm. The firm did not carry worker's compensation insurance on the worker. The worker did not have any exposure to economic loss or financial risk. The firm established the level of payment for all services rendered. The worker states that the firm provided facilities, wine, and all retail wine sales credit card services for their job duties. The worker did not have to provide anything or lease any space, facilities, or equipment. The worker did not incur any expenses during the performance of services for the firm. The worker was paid an hourly wage. Customers would pay the firm for all services rendered.

The firm states that they did not provide the worker with any benefits during the work relationship. The relationship could be terminated by either party without incurring loss or liability. The firm states that the worker performed services for other firms at the time they worked for the firm and did not require approval from the firm to do so. The worker was not a member of a union. The worker did not advertise services to the public. The only advertisement of services that the worker provided included mentioning events and promotions on behalf of the winery to customers of the firm. The firm states that they represented the worker as a bartender to their customers. The firm states that the work relationship ended when the worker became ill and could not longer perform services for the firm. The worker states that they did not perform similar services for any other firm. There were no agreements in place prohibiting competition between the parties. The worker states that they were represented by the firm as an employee of the winery. The worker was required to wear a name tag with the firm's name and logo while performing services for the firm.

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 as a winery. The firm provided work assignments by virtue of the customers served, required the worker to report on services performed and provide time sheets to the firm, 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 worker did not incur any expenses in the performance of their job duties. 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 worker was required to perform services while wearing a name tag bearing the name and logo of the firm, demonstrating a representation of the worker as an employee under the firm's name. 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.