

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 April 2019 to January 2020 as a kitchen manager. The firm issued the worker Form 1099-MISC for 2019. The worker filed Form SS-8 as they believe they received Form 1099-MISC in error. There was no written agreement between the parties. The worker believes they are an employee due to the level of control the firm had over the worker's job duties and the worker did not have an investment in the firm's business.

The firm's response states it is a community-owned natural food co-operative. The work provided by the worker was as a kitchen manager. The worker was requested to use co-op grocery ingredients to create recipes and prepare food for the firm's customers. The firm did not provide supervision or direction. The firm states that they reclassified the worker to an independent contractor from an employee to accommodate the worker's schedule.

The firm states that they did not provide training to the worker. The firm provided ingredients and large kitchen equipment on-site for the worker to complete their job duties, and the worker provided their own laptop, recipes, and kitchen tools. The firm states that the worker and firm established an agreed-upon menu to offer to customers and the worker determined the methods by which job assignments were performed. The firm's organizers would work with the worker to establish resolution for any problems that would arise during job duties. The worker was not required to provide the firm with any reports. The worker was required to provide duties for the firm with open hour availability between Monday through Saturday, 11am to 3pm. The worker performed services solely at the firm's premises, and no meetings were required of the worker. The worker was not required to personally provide services and could refer helpers or substitutes to the firm. The worker was required to seek approval from the firm regarding additional help. The worker states that their job assignments came from the firm's director who also determined the methods by which they were performed. The worker was required to provide the firm with daily updates on the firm's store and ingredients via phone or text. The worker provided customer service and hot food preparation solely at the firm's premises. The worker states that they were required to attend periodic collaborative meetings with the firm's management. The worker states that they were required to perform all services personally. Any helpers or substitutes needed were the responsibility of the firm's director to hire and pay.

The firm states that the provided kitchen equipment, tools, ingredients, water, counter and register for the worker's job duties. The worker would provide a laptop for planning, recipes, additional tools, aprons, and licensing. The worker did not have to lease space, facilities, or equipment. The worker would incur expenses related to their tools, laptop, research, education, and printing costs. The worker was paid an hourly wage with no access to a drawing account. The firm did not carry worker's compensation insurance on the worker. The worker's financial risk involved hours changing due to loss of demand for services. The worker would collaborate with the firm on setting menu prices. The worker states that the firm provided all supplies, materials, equipment and property for the job. The firm provided most ingredients for recipes but sometimes the worker would incur ingredient costs. Some of these ingredient purchases were reimbursed by the firm. The worker was initially paid a salary by the firm, then the payment was switched to hourly. Customers of the firm paid the firm. The worker states that they faced no economic loss or financial risk.

The firm did not provide the worker with benefits. The relationship could be terminated by either party without incurring loss or liability. There was no agreement prohibiting competition between the parties. The worker would advertise the firm's services on signs and on Facebook. The firm states that they represented the worker as a contractor preparing for under the firm's name. The work relationship ended when the worker's hours were cut, leading to tension between the parties. The worker states that they did not provide similar services for any other firm while working for the firm. The worker was not a member of a union. All products created were the property of the firm. The worker states that they were represented as an employee of the firm. The worker states that they quit, thus ending the work relationship.

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 a food co-operative. The firm provided work assignments by virtue of the customers served, required the worker to report on services performed through inventory reports, 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 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.