

SS-8 Determination—Determination for Public Inspection

Occupation 05FIW.6 Food Industry Worker	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

It is our usual practice in cases of this type to solicit information from both parties involved. Upon the submission of the Form SS-8 from the worker, we requested information from the firm concerning this work relationship. [REDACTED], president of the firm, responded to our request for completion of Form SS-8.

From the information provided the firm is in the business of selling food to the public and the worker was engaged as a server bringing dishes of food to the public and cleaning tables. The worker was required to personally perform his services at the firm's premises. At the beginning of the work relationship, the firm states the worker worked the same days and the same hours. The firm treated the worker as an employee during this time period reporting his earnings on a Form W-2. The firm states they later allowed the worker to make his own schedule as he was a student and friend. The firm changed the worker's status at that time to an independent contractor reporting his earnings on a Form 1099-MISC. This determination will decide the employment tax status of the worker's services while being treated as an independent contractor.

The firm states they provided basic training to the worker regarding bringing dishes to the public and cleaning the tables. The firm states the worker told them what days he was available to work. The firm states they determined how the worker performed his services and the worker was required to notify them if any problems or complaints arose for their resolution. The firm states the worker was not required to submit reports and while there were meetings, he was not required to attend.

The firm provided the restaurant and all equipment, supplies, and materials to the worker in order to perform his services. The worker provided a black shirt and black pants and he incurred expenses for dry cleaning of these clothes. The firm states they paid the worker a flat payment when he received a Form 1099-MISC. The clients paid the firm and the firm states they carried workers' compensation insurance on the worker. The worker did not have an opportunity to incur a loss as a result of his services.

Because the worker worked on a part-time basis, the firm states the worker was not eligible for employee benefits. The worker did not perform similar services and either party could terminate the work relationship at any time without either party incurring a liability. Both parties agree the worker terminated the work relationship.

Analysis

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, the firm provided basic training to the worker on serving food and cleaning tables. The worker provided his services on behalf of and under the firm's business name rather than an entity of his own. The firm was responsible for the quality of the work performed by the worker and for the satisfaction of their clients. This gave the firm the right to direct and control the worker and his services in order to protect their financial investment, their business reputation, and their relationship with their clients.

The firm's statement that the worker determined the hours he was worked and therefore, an independent contractor is without merit. The total work relationship needs to be analyzed as to the worker's status and this factor, in and of itself, does not determine the worker's status as an independent contractor.

A continuing relationship was established rather than a one-time transaction taking place. A continuing relationship may exist where work is performed in frequently recurring although irregular intervals. The existence of a continuing relationship indicates an employer/employee relationship was established.

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.

While the worker was responsible for providing his work clothing, this is not considered a significant investment. 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.

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.

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.