

SS-8 Determination—Determination for Public Inspection

Occupation

05FIW.9 Food Industry Worker

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

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Facts of Case

The firm is in the business of operating a small cafe. The worker was engaged as a helper. She received a 2012 and 2013 1099-MISC for her services; she also provided her services in 2014 as well. There was no written agreement.

The firm indicated that the worker received no training or instructions and had no work assigned. The worker likely was familiar with what needed to be done as she had worked for a previous owner of the cafe. The state health department and the worker determined the methods by which the assignments were performed, according to the firm; but the worker noted that her work assignments were given verbally by the owner who determined the methods by which the assignments were performed. Both agreed that the worker was to contact the firm if any problems or issues arose. There were no required reports. The worker worked according to the firm's set scheduled hours of operation and performed necessary tasks for lunch service at the café. If unable to work, she was to call the firm. She was required to provide the services personally with only the firm hiring and paying any substitute workers.

The firm provided all supplies, equipment, material, as well as the property/cafe. Both parties agreed that the worker received an hourly rate of pay and had no other economic risk. The customer paid the firm.

Both the firm and the worker agreed that there were no benefits and that either party could terminate the relationship without incurring a liability. The worker did not perform similar services for others. The worker was represented as a helper at the café. Both agreed that the relationship ended when the worker quit.

Analysis

In determining whether an individual is an employee or an independent contractor under the common law, all evidence of both control and lack of control or independence must be considered. The relationship of the worker and the business must be examined. Facts that show a right to direct or control how the worker performs the specific tasks for which he or she is hired, who controls the financial aspects of the worker's activities, and how the parties perceive their relationship should be considered. 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.

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 retained the right to change the worker's methods and to direct the worker to the extent necessary to protect its financial investment. It is acknowledged that the worker's duties were likely part of a regular established routine. She performed her services according to the firm's scheduled work hours and days; she would call in if not reporting to work. A worker who is required to comply with another person's instructions about when, where, and how he or she is to work is ordinarily an employee. This control factor is present if the person or persons for whom the services are performed have the right to require compliance with instructions. Some employees may work without receiving instructions because they are highly proficient and conscientious workers or because the duties are so simple or familiar to them. Furthermore, the instructions, that show how to reach the desired results, may have been oral and given only once at the beginning of the relationship. In addition, the worker provided her services on a continuous basis throughout the time period involved. 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.

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. The worker simply received an hourly rate of pay and had no other economic risk. Payment by the hour, 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. The worker was provided with a place to work, and everything needed to provide her services as a helper in the cafe's operation illustrating her lack of investment as well as an inability for a profit or 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. There were no benefits and there was no written agreement. The worker was a helper at the firm's place of business. She was not engaged in an independent enterprise, but rather the services performed by the worker were part of the necessary activities of the firm's cafe operations. 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.

The worker may have agreed to have to her 1099 status denoting an independent contractor relationship; however, in *Bartels v. Birmingham*, 332 U. S. 126, 1947-2 C. B. 174, the Supreme Court stated that whether there is an employment relationship is a question of fact and not subject to negotiation between the parties. In other words, two parties cannot simply agree to a certain type of work relationship if it does not exist. In this case, the facts supported an employer-employee relationship.

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.