

SS-8 Determination—Determination for Public Inspection

Occupation

05FIW.13 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

For IRS Use Only:

Facts of Case

The firm is in the business of operating a fried chicken restaurant. The worker was engaged as a cook and cashier. She received a 2013 Form 1099-MISC for her services. There was no written agreement.

Both the firm and the worker indicated that the worker was provided with instructions regarding how to clean and cook the chicken as well as how to operate the cash register. Both parties also agreed that the worker had routine daily tasks. Both agreed that the firm determined the methods by which the assignments were performed and would be contacted if any issues/problems arose. The worker noted that she reported her time in/out on an employee time log. She worked five to six days a week from 9AM-11PM, cooking food, preparing orders, answering phone calls and performing cashier services. Both parties agreed that the worker provided her services at the firm's location. Only the worker mentioned occasional, mandatory meetings. Both also agreed that the firm would hire and pay any substitute workers.

Both the firm and the worker agreed that the firm provided all the cooking and cleaning supplies, equipment, tools and the workplace. Both agreed that the worker was paid an hourly rate and had no other economic risk. Both parties also agreed that the customer paid the firm. Each indicated that the other established the level of payment for services.

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 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 degree of importance of each factor varies depending on the occupation and the context in which the services are performed.

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. The firm provided the worker with instructions and her assigned duties even if those tasks became part of a daily routine. She performed her services according to the firm's scheduled work hours and days. The firm indicated that there was no set scheduled hours, and while it is acknowledged that the worker possibly worked varying and flexible hours from week to week, it would be unreasonable to assume that the firm did not know when the worker would be in to cook at its restaurant. 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. The worker also provided her services on a continuous basis, even if her hours varied, 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.

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 firm operates a restaurant and engaged the worker as a cook and cashier. In this case, the worker not engaged in an independent enterprise, but rather the services performed by the worker were part of the necessary activities of the firm's 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.

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.