

SS-8 Determination—Determination for Public Inspection

Occupation

05FIW.19 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 a venue in the business of live music. The worker provided her services to the firm in 2012 through 2014 as a bartender mixing and pouring drinks, stocking beer, maintained a clean bar, mopped, handled money transactions and received the Form 1099-MISC in 2013 for these services.

The worker stated that the firm trained her to do all the tasks the job required. The firm stated that there was no training. The worker received her schedules through e-mails and the firm's manager determined the methods by which the assignments were performed. If problems or complaints arose the worker was required to contact either the firm's manager or owner and they were responsible for problem resolution. The worker indicated that the firm required her to submit daily tip reports, and use the time clock. The worker's schedule varied. In the summertime she worked 2:00PM to 4:00PM lunch, and then went back to 5-6:00PM until approximately 2-3:00AM. The firm maintains that the worker's schedule changed daily. She provided her services on the firms' premises. The worker reported that if additional help was required, the firm hired and compensated the helpers.

The firm provided all the necessary supplies and equipment the worker needed to provide her services such as the cash register, bar tools, wine and beer openers, alcohol, and beer. The worker did not lease any equipment nor were any business expenses incurred in the performance of her services. She received an hourly wage for her services. The firm added that the worker also received tips. The firms' customers paid the firm for the services the worker provided. The worker did not assume any financial risk in the relationship. The firm established the level of payment for the services the worker provided.

The worker did not perform similar services to others during the same time period. She provided her services under the firm's business name. Both parties retained the right to terminate the relationship without incurring liability.

Analysis

The application of the three categories of common law evidence to the available facts of the relationship indicates that the firm retained the right to direct and control the worker in the performance of her services. Accordingly, the worker was an employee of the firm for purposes of Federal employment taxes.

Worker status is not something to be selected by either the firm or the worker. Worker status is determined by the examination of the actual working relationship as applied to Internal Revenue Service code.

Although the firm submitted a Form W-9 believing that this is indicative of an Independent Contractor status, the fact remains that the Form W-9 is simply used as an information document to verify a Taxpayer Identification Number, or a valid Social Security number and has no bearing on the SS-8 determination process. The Form W-9 is also used to indicate that the worker is not subject to "Backup Withholding" Backup Withholding is a specific type of withholding and should not be confused with Federal Income Tax withholding.

Hence, to clarify the Federal Government's position on worker status, we will be determining this case based on their common law practices in which the actual relationship between the parties is the controlling factor.

The firm trained the worker regarding the performance of her services. Training a worker by requiring an experienced employee to work with the worker, by corresponding with the worker, by requiring the worker to attend meetings, or by using other methods, indicates that the person or persons for whom the services are performed want the services performed in a particular method or manner. This is true even if the training was only given once at the beginning of the work relationship. The firm retained the right, if necessary to protect their business interest, to determine or change the methods used by the worker to perform her assignments. The facts show that the worker was subject to certain restraints and conditions that were indicative of the firm's control over the worker. 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 had a continuous relationship with the firm as opposed to a single transaction. 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. The worker's services were under the firm's supervision.

The firm provided the worker with the necessary equipment and materials. The fact that the person or persons for whom the services are performed furnish significant tools, materials, and other equipment tends to show the existence of an employer-employee relationship. Her pay was based on an hourly rate. 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. 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. The worker could not have incurred a loss in the performance of her services for the firm, and did not have any financial investment in a business related to the services performed.

The worker worked under the firm's name, and her work was integral to the firm's business operation. The above facts do not reflect a business presence for the worker, but rather, strongly reflect the firm's business. Either the firm or the worker could terminate the agreement.

Based on the common-law principles, the firm had the right to direct and control the worker. The worker shall be found to be an employee for Federal tax purposes.