
SS-8 Determination—Determination for Public Inspection

Occupation

FIW - 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 is seeking a determination of worker classification for services performed for the firm as a server from May 2025 until December 2025. The worker filed a Form SS-8 because they believe that they erroneously received a 1099-NEC from the firm.

The worker believes that they were an employee of the firm because they are not a contractor and do not own their own business. The worker was verbally informed by the firm after two employee meetings that they would be classified by the firm as an independent contractor. There were no written agreements between the parties.

The firm states that they are a bakery and café. The worker provided services for the firm as a waitress and counter assistant, waiting on tables and running the register at the bakery. The firm classified the worker as an independent contractor per the worker's request. There were only verbal agreements between the parties.

The firm states that the worker had previous waitressing experience. The firm owner gave the worker job assignments in person and determined the methods by which job duties were performed. If the worker encountered any problems or complaints while working, they were required to contact the firm owner for problem resolution. There were no reports required of the worker. Services were performed as needed at the firm's premises. There were no meetings required of the worker. The firm required the worker to personally perform services. The worker could not hire helpers or substitutes and was not responsible for their payment. The firm had to approve all hiring. The worker states that they did not receive training but were instructed to take care of customers. The firm owners provided job assignments to the worker in person, determined how jobs were performed, and assumed responsibility for problem resolution. Services were performed as scheduled at the firm's premises. The worker had no hiring authority.

The firm states that they provided the worker with the bakery premises and the uniform. The worker did not provide anything and did not lease any space, facilities, or equipment. There were no job-related expenses incurred by the worker. Customers paid the firm. The firm paid the worker an hourly rate of pay with no access to advance pay. The firm did not carry worker's compensation insurance on the worker. The worker could not suffer a financial loss and did not take a financial risk while working for the firm. The worker states that the firm provided shirts, aprons, and order books. The worker did not provide or lease anything and had no job-related expenses. The worker had no exposure to financial risk or loss while working for the firm. The firm set the rate of pay for services performed and the price of products sold.

The firm states that they did not provide benefits to the worker. The relationship between the parties could be terminated by either party without liability of penalty. The worker did not perform similar services for other firms. There were no non-compete agreements in place between the parties. The worker did not advertise their services to the public. The firm represented the worker to customers as an employee providing services under the firm's name. The worker ended the work relationship. The worker states that they did not perform similar services for other firms or advertise their services to the public. The firm represented the worker to customers as a server performing services under the firm's name. The worker ended the work relationship when the firm refused to classify the worker as a W2 employee.

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, co-adventurer, 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 as a bakery and cafe. The firm provided work assignments by virtue of the customers served 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. 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. As stated by both parties, the worker had no job-related expenses and did not have a financial risk in the performance of their job duties. 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 as a restaurant. 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.