Form **14430-A** (July 2013)

Department of the Treasury - Internal Revenue Service

SS-8 Determination—Determination for Public Inspection

Occupation	Determination:
05PCP Personal Care Providers	☒ 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 non-profit organization. The worker was engaged by the firm as a bartender. The firm reported the worker's remuneration on Forms W-2 for 2015 and 2016 and Form 1099-MISC for 2017. The firm stated that when the worker wanted to fill in and not have a regular schedule, she she requested to be paid in cash at the end of each shift. The firm informed the worker that she would be issued Form 1099-MISC at the end of the year and that she would be responsible for her own taxes.

Information from the parties supports that the worker was responsible for her maintaining her own liquor license and training. The worker received her work assignments when she was hired, communicated to her by the manager on duty. If problems or complaints occurred, the worker contacted the manager, and the manager helped with their resolution. The worker performed her services on the firm's premises. She was required to perform her services personally.

The firm provided the alcohol and glasses. It paid the worker by shift/hour. The firm did not cover the worker under workers' compensation. Neither party indicated an investment by the worker in a related business, or the risk of the worker incurring a financial loss beyond the normal loss of compensation.

The firm did not make benefits available to the worker. The worker performed her services under the firm's name. Both parties reserved the right to terminate the work relationship without incurring a penalty or liability, and in fact, the firm terminated the work relationship.

Analysis

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, coadventurer, agent, or independent contractor must be disregarded. Therefore, the firm's statement that the worker was an independent contractor pursuant to an 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. The fact that the worker may have requested to not have employment taxes withheld from her earnings is irrelevant. If an employer-employee relationship exists, the firm is obligated by law to withhold the appropriate employment taxes.

Factors that illustrate whether there was a right to control how a worker performed a task include training and instructions. In this case, although the firm relied upon the worker's prior training and experience to perform her services, it was responsible for resolving any problems or complaints that may have occurred, showing it retained the right to change the worker’s methods and to direct the worker to the extent necessary to protect its financial investment. The worker was required to perform her services personally, meaning that she could not engage and pay others to perform services for the firm on her behalf. 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. These facts show that the firm retained behavioral control over the services of the worker.

Factors that illustrate whether there was 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. Lack of significant investment by a person in facilities or equipment used in performing services for another indicates dependence on the employer and, accordingly, the existence of an employer-employee relationship. “Profit or loss” implies the use of capital by a person in an independent business of his or her own. The firm paid the worker at an hourly rate. Payment by the hour generally points to an employer-employee relationship. These facts show that the firm retained control over the financial aspects of the worker’s services.

Factors that illustrate how the parties perceived 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 were part of the service recipient’s regular business activities. In this case, the worker performed her services on a continuing basis. 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 was not engaged in an independent enterprise, but rather the services performed by the worker as a bartender were a necessary and integral part of the services provided by the firm. 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 business. Although the firm did not make benefits available to the worker, the firm terminated the work relationship without incurring liability or penalty. The right to discharge a worker is a factor indicating that the worker is an employee and the person possessing the right is an employer. These facts show that the firm retained control over the work relationship and services of the worker.

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.