
SS-8 Determination—Determination for Public Inspection

Occupation

DVC - Drivers & Vessel Control

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 delivery driver from January 2025 until December 2025. The worker filed a Form SS-8 because they believe that they erroneously received a 1099-NEC from the firm despite working under the conditions as an employee.

The worker believes that they were an employee of the firm because the firm controlled their work hours and assigned deliveries, the worker could not refuse jobs, and the firm was responsible for setting prices. There were no written agreements between the parties. The verbal agreement was that the worker would deliver customer orders as assigned by the firm owner, and the management would provide instructions and procedures for the worker to follow.

The firm states that they are a take-out, delivery, and dine-in restaurant. The worker performed services for the firm as a food delivery driver, picking up food orders at the restaurant and delivering them to customers using their own vehicle. The worker followed delivery instructions, communicated about delays and issues, and kept accurate records of completed deliveries and mileage. The firm classified the worker as an independent contractor because they used their own vehicle, they paid for their own expenses, the worker stopped working after peak time, the worker could reject assignments under certain circumstances, and the worker performed services mainly during the dinner rush. There were no written contracts between the parties.

The firm states that the worker was not required to undergo formal training and the firm did not provide detailed instructions to the worker on delivery methods or routes. The firm provided job assignments to the worker in person. The worker 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 for problem resolution. There were no reports required of the worker. Services were performed as scheduled during the dinner rush. The firm did not require the worker to attend meetings. The worker was required to personally perform services. The worker could hire helpers or substitutes without the firm's approval but would not be responsible for their payment. The worker states that the firm provided them with an orientation to the work, delivery procedures, and company policies. The firm's management 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 management for problem resolution. Services were performed as scheduled at the firm's premises 30% of the time and customer locations 70% of the time. The firm required the worker to personally perform services. The worker had no authority to hire helpers or substitutes.

The firm states that they did not provide anything and the worker provided their vehicle. The worker did not lease any space, facilities, or equipment. The worker incurred gas and maintenance expenses as well as insurance for their vehicle. No expenses were reimbursed by the firm. Customers reimbursed expenses for 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's maintenance and vehicle expenses were their exposure to financial risk or loss. The firm set the rate of pay for services performed. The worker states that they did not provide anything and the worker provided a car and gas. The worker's only job-related expenses were gas and car maintenance expenses. The worker had no exposure to financial risk or loss while working for the firm.

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 or 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 did not represent the worker to customers. The worker quit and ended the work relationship. The worker states that they did not advertise their services to the public or perform similar services for other firms. Services were performed under the firm's name.

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 restaurant. 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. 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.