

SS-8 Determination—Determination for Public Inspection

Occupation

04MAN Managers/Supervisors

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**

Information provided indicated the firm is an antique mall. The worker performed services in 2017 and 2018 for the firm. the firm indicated she was responsible, as a part time contractor, to help boost social media presence on various avenues. Her other assignment was to decorate the store (any way she saw fit) to appeal to the largest number of customers. No offer of employment was given. worker was told it was a 1099 position, she had a flexible work schedule, based on her job as a travel agent, and her volunteer work for her church. The worker was paid by the hour, only for the hours she worked on her assignments. The majority of her job was performed on her own laptop. She was not reimbursed for the use of her phone or data used. The firm indicated she could provide similar services for others. The work assignments were given from the firm owners. Services were performed on firm premises eight percent of the time, and from her home twenty percent. The firm did not provide the hours worked. The firm indicated she was required to provide her services personally. The firm indicated the customer paid the firm. No additional benefits were given to the worker. Either party could terminate without incurring a penalty or liability. The firm indicated the work relationship was ended for poor performance.

The worker indicated her services were as an assistant manager. Her duties were to run the front desk and sales as needed, social media postings, and maintain good relationships with vendors and customers, help with monthly billing. She indicated she was instructed how to list items for sale on social media accounts, trained on the point of sale system and maintaining vendor database. Work assignments were via text, e-mail, handwritten notes or verbally from the firm. She agreed she provided time sheets recording the hours worked. The worker indicated she had regular set hours. She would open, take pictures of items to list on line, meet and greet customers. She indicated ninety five percent of her work was performed at the store. She agreed she was to perform her services personally. She indicated the firm provided the computer, she provided her cell phone. She agreed she was paid by the hour, with paid holidays and personal days. The customer paid the firm. Either party could terminate the work relationship without incurring a penalty to liability. She indicated she was terminated by the firm.

ANALYSIS

The question of whether an individual is an independent contractor or an employee is one that is determined through consideration of the facts of a particular case along with the application of law and regulations for worker classification issues, known as "common law." Common law flows chiefly from court decisions and is a major part of the justice system of the United States. Under the common law, the treatment of a worker as an independent contractor or an employee originates from the legal definitions developed in the law and it depends on the payer's right to direct and control the worker in the performance of his or her duties. Section 3121(d)(2) of the Code provides that the term "employee" means any individual defined as an employee by using the usual common law rules.

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.

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. We must examine the relationship of the worker and the business. We consider 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. The degree of importance of each factor varies depending on the occupation and the context in which the services are performed. Therefore, your 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 establishment of set hours of work by the person or persons for whom the services are performed is a factor indicating control. If the nature of the occupation makes fixed hours impractical, a requirement that workers be on the job at certain times is an element of control.

If a worker must perform services in the order or sequence set by the person or persons for whom the services are performed, that factor shows that the worker is not free to follow the worker's own patterns of work. Often, because of the nature of an occupation, the person or persons for whom the services are performed do not set the order of the services or set the order infrequently. However, if the person or persons retain the right to control the order or sequence of the work, this is sufficient to indicate an employer-employee relationship.

Analysis

We have applied the above law to the information submitted. As is the case in almost all worker classification cases, some facts point to an employment relationship while other facts indicate independent contractor status. The determination of the worker's status, then, rests on the weight given to the factors, keeping in mind that no one factor rules. The degree of importance of each factor varies depending on the occupation and the circumstances.

Evidence of control generally falls into three categories: behavioral control, financial control, and relationship of the parties, which are collectively referred to as the categories of evidence. In weighing the evidence, careful consideration has been given to the factors outlined below.

Factors that illustrate whether there is a right to control how a worker performs a task include training and instructions. In this case, you retained the right to change the worker's methods and to direct the worker to the extent necessary to protect your financial investment.

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. Payment by the hour, week, or month generally points to an employer-employee relationship. 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. The fact she utilized her own phone or laptop, does not indicate a significant business or financial investment.

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 your business. Both parties retained the right to terminate the work relationship at any time without incurring a liability.

CONCLUSION

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. No evidence was submitted to indicate the worker owned and operated her own business to provide the services. Most services were performed on firm premises, under the firm's business name. The fact there may have been a flexible work schedule, does not indicate the worker owned and operated her own business. She was paid by the hour, indicating no opportunity for profit or loss.