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Department of the Treasury

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Person to Contact:

Telephone Number:

Refer Reply To:
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Date:
April 11, 2001

Key

worker =

firm =

Dear

This is in reply to a request for a ruling to determine the work status for federal employment tax purposes of the above-named worker with respect to services she has performed for the firm since May 4, 2000. Federal employment taxes are those imposed by the Federal Insurance Contributions Act (FICA), the Federal Unemployment Tax Act (FUTA), and the Collection of Income Tax at Source on Wages.

According to the information submitted, the firm is a military commissary. Pursuant to a written agreement, the worker was granted a license to provide services as a bagger. The agreement provides that the worker is not an employee and is not under the supervision, direction, or control of any employee of the firm. The worker is remunerated solely on the basis of tips she receives from commissary patrons. The agreement provides that the worker may perform similar services for others. The worker is not eligible to participate in any employee pension, health, or other fringe benefit plan at the commissary. The agreement provides that the worker is responsible for the replacement cost of any damages to groceries she may cause. The worker is also responsible for the cost of a smock or badge identifying herself to patrons as a bagger. The worker's services are managed by the head bagger, who also arranges the work schedule. The head bagger is one of the baggers who is elected by the other

baggers annually. Baggers compensate the head bagger with a few dollars a day. The head bagger is not an employee of the commissary.

Section 3121(d)(2) of the Internal Revenue Code (the Code) defines “employee” as any individual who, under the usual common law rules applicable in determining the employer-employee relationship, has the status of an employee.

The question of whether an individual is an employee under the common law rules or an independent contractor is one of fact to be determined upon consideration of the facts and the application of the laws and regulations in a particular case. Guidance for determining the existence of that status is found in three substantially similar sections of the applicable Employment Tax Regulations: section 31.3121(d)-1 relating to the FICA, section 31.3306(i)-1 relating to the FUTA, and section 31.3401(c)-1 relating to federal income tax withholding.

Section 31.3121(d)-1(c)(2) of the regulations provides that generally, the relationship of employer-employee exists when the person for whom the services are performed has the right to direct and control the individual who performs the services not only as to the result to be accomplished by the work, but also as to the details and means by which that result is accomplished. It is not necessary that the employer actually direct or control the manner in which the services are performed, 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 relationship by the parties as anything other than that of employer and employee is immaterial. Thus, if an employer-employee relationship exists, it is of no consequence that the employee is designated as partner, coadventurer, agent, or independent contractor or the like.

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 autonomy must be considered. In doing so, one must examine the relationship of the worker and the business. Relevant facts generally fall into three categories: (1) behavioral controls, (2) financial controls, and (3) the relationship of the parties.

Behavior controls are evidenced by facts which illustrate whether the service recipient has a right to direct or control how the worker performs the specific tasks for which he or she is hired. Facts which illustrate whether there is a right to control how a worker performs a task include the provision of training or instruction.

Financial controls are evidenced by facts which illustrate whether the service recipient has a right to direct or control the financial aspects of the worker’s activities. These factors include whether a worker has made a significant investment, has unreimubursed expenses, and makes services available to the relevant market; the method of

payment; and the opportunity for profit or loss.

The relationship of the parties is generally evidenced by the parties' agreements and actions with respect to each other, including facts which show not only how they perceive their own relationship but also how they represent their relationship to others. Facts which 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.

We have carefully considered the information submitted in this case and, in view of the facts discussed above, we conclude that the firm does not exercise the degree of direction and control necessary to establish an employer-employee relationship. Accordingly, we conclude that the worker is not an employee of the firm for federal employment tax purposes.

This ruling is directed only to the taxpayer(s) requesting it. Section 6110(k)(3) of the Code provides that it may not be used or cited as precedent.

If you have any questions regarding this matter, please contact at (not a toll-free number).

Sincerely,

Michael A. Swim
Chief, Employment Tax Branch 1
Office of Division Counsel/Associate Chief Counsel
(Tax Exempt & Government Entities)

Enclosures:
Copy of ruling letter
Copy for section 6110 purposes