

SS-8 Determination—Determination for Public Inspection

Occupation Business/Computer Services/Office/Sales	Determination: <input checked="" type="checkbox"/> Employee <input type="checkbox"/> Contractor
UILC	Third Party Communication: <input checked="" type="checkbox"/> None <input type="checkbox"/> 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 bubble tea restaurant. The firm engaged the worker as a barista from 07/2020 to 2/2021. The worker submitted a Form SS-8 after receiving a Form 1099-Misc from the firm.

The worker completed an application for the job. The firm provided training, instructions, and supervision as to the details and means by which the worker was to perform the services. The worker received her work assignments from the firm. The firm determined the methods by which those assignments were performed. According to the worker, she would typically work 8-20 hours a week as scheduled by the firm. The worker received remunerations for her services. The firm was responsible for problem resolution. The firm indicated the worker was to provide a shift report at the end of her shift. She performed the services on the firm's premises. The worker was not required to attend any meetings. The relationship between the parties was continuous, as opposed to a one-time transaction. The nature of this relationship contemplated that the worker would perform the services personally. The worker worked exclusively and on a continuing basis for the firm. Her services were an integral and necessary part of the services the firm provided to its customers.

The firm furnished the worker with all the necessary equipment, supplies, and materials to perform the services. The worker did not lease equipment. The firm determined the fees to be charged. The worker did not incur any business expenses. The worker was paid an hourly wage. The firm did not allow the worker a drawing account, or advances against anticipated earnings. The firm's customers paid the firm. The firm did not carry worker's compensation insurance on the worker. The worker did not have a substantial investment in equipment or facilities used in the work and did not assume the usual business risks of an independent enterprise.

The worker was not eligible for sick pay, vacation pay, health insurance, or bonuses. Either party could terminate the work relationship at any time without incurring a penalty or liability. There was a "non-compete" agreement between the parties. The worker was not a member of a union. According to internal research, the worker did not perform the services for others. She did not advertise her services to the public or maintain an office, shop, or other place of business. She was required to perform the services under the name of the firm and for the firm's customers. The relationship between the parties ended when the worker resigned.

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.

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.

The firm's contention that the worker was treated as an independent contractor pursuant to an agreement for her to be treated as such is without merit. It is the firm's responsibility to treat workers according to federal employment tax guidelines and law. Neither the firm nor the worker has the right to decide whether the worker should be treated as either an independent contractor or an employee. Worker status is dictated by the characteristics of the work relationship. If the work relationship meets the federal employment tax criteria for an employer/employee relationship, federal tax law mandates that the worker be treated as an employee.

If a firm has to make a worker "understand" or "agree to" being an independent contractor (as in a verbal or written agreement or the filing of a Form W-9), then the worker is not an independent contractor. An individual knows they are in business for themselves offering their services to the public and does not need to be made aware of, understand, or agree to be an independent contractor.

A worker who is required to comply with another person's instructions about when, where, and how he or she is to work is ordinarily an employee. This control factor is present if the person or persons for whom the services are performed have the right to require compliance with instructions. Some employees may work without receiving instructions because they are highly proficient and conscientious workers or because the duties are so simple or familiar to them. Furthermore, the instructions, that show how to reach the desired results, may have been oral and given only once at the beginning of the relationship.

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 firm determined the rates charged to the customers and the customers paid the firm's business directly for the services provided by the worker. The worker was not allowed a drawing account against future earnings. The worker was provided remuneration in the form of an hourly wage and it was the firm who determined the worker's method of payment and paid the worker as an individual and not to a business account.

A person who can realize a profit or suffer a loss as a result of his or her services is generally an independent contractor, while the person who cannot is an employee. "Profit or loss" implies the use of capital by a person in an independent business of his or her own. The risk that a worker will not receive payment for his or her services, however, is common to both independent contractors and employees and, thus, does not constitute a sufficient economic risk to support treatment as an independent contractor. If a worker loses payment from the firm's customer for poor work, the firm shares the risk of such loss. Control of the firm over the worker would be necessary in order to reduce the risk of financial loss to the firm. The opportunity for higher earnings or of gain or loss from a commission arrangement is not considered profit or 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 firm's regular business activities. In this case, both parties retained the right to terminate the work relationship at any time without incurring a liability.

Usually, independent contractors advertise their services and incur expenses for doing so. In this case, the worker not only did not advertise her services, but she filled out an application for a job. This is a strong indicator that the worker is not an independent contractor.

Based on the common-law principles, the firm had the right to direct and control the worker. The worker shall be found to be an employee for Federal tax purposes.

The firm can obtain additional information related to worker classification online at www.irs.gov; Publication 4341.