

**SS-8 Determination—Determination for Public Inspection**

Occupation

02CON Consultant and Client Representative

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 initiated the request for a determination of her work status as a senior care consultant in tax year 2017. The firm's business is described as a placement agency for seniors in need of assisted living, memory care, or board and care.

The firm's response was signed by the president. The firm's business is senior care services. The worker provided services networking for the firm to bring in potential referrals and placements. The firm stated the verbal contract was for 6 months. The worker never questioned the compensation of \$XXX paid twice a month. The arrangement was that worker would solicit potential customers and placements; if she brought in and worked a client through eventual placement she would receive a YY% commission.

The worker indicated the job assignments came from the firm and referred sources; and, it was the firm that determined the methods by which the worker's services were performed. Any problems or complaints encountered by the worker were directed to the firm for resolution. The worker's services were rendered part-time, 20 hours/week. The worker was required to perform the services personally.

According to the firm, there were no specific trainings and instructions given to the worker. The worker's job assignment was to network for clients for the firm; and, it was the worker that determined the methods by which the worker's services were performed. Any problems or complaints encountered by the worker were directed to the firm for resolution. The firm responded the worker's services were rendered at customer/client locations and that she had no set schedule. The worker was required to perform the services personally. Both parties acknowledged that there were no other workers or employees within this firm.

The firm provided the worker with access to the CRM (Customer Relationship Management system helps manage customer data. It supports sales management, delivers actionable insights, integrates with social media, and facilitates team communication), business cards, care discovery form, and the firm's manual. The worker furnished a car, computer, copies of documents, and a car organizer. The worker did not lease equipment, space, or a facility. The worker agreed she was paid a salary and commission, as noted above. The customers paid the firm. The worker responded that she was not at risk for a financial loss in this work relationship; she had expenses for gas and entertainment for coffee or lunch. The worker did not establish the level of payment for services provided or products sold.

The firm indicated the worker was provided marketing materials explaining the firm's services. The firm paid the worker \$XXX twice a month for networking plus commissions for placements and indicated the customers paid the firm. The firm confirmed the worker was not covered under the firm's workers' compensation insurance policy. The worker was not at risk for a financial loss in this work relationship. The firm established level of payment for services provided or products sold.

Both parties agreed that no benefits were extended to the worker and that either party could terminate the work relationship without incurring a liability or penalty. The firm responded the worker was performing same or similar services for others during the same time frame; the worker disagreed. The worker offered related insurances to seniors. The worker was networking, knocking on doctors' offices, following industry-provided leads as to in-home care agencies, and assisted living facilities. The terms of the agreement were submitted to and subject to the firm's approval. The worker's territory was determined by the firm.

The worker provided copy of an employee acknowledgment letter signed and dated by her on 3/7/2017: the worker was hired by the firm, an independent franchise owner in the Franchise Systems LLC; the firm is the only employer, that provides the paycheck, establishes hours, and is responsible for all decisions relating to the employment relationship. The worker also provided a copy of her business card for the firm, as a senior care consultant referencing the firm's website and her email through the firm's email address.

The firm provided the worker with leads to prospective customers; there were no reporting requirements, she would add potential clients to the CRM system. If she placed a client in an assisted living facility she notified the firm to be paid. The firm set worker's territory; but, she frequently went outside the area. The worker did not pay for the privilege of serving customers in a territory. The firm provided a copy of the Nondisclosure, Nonsolicitation, and Noncompetition Agreement the Franchise Systems LLC signed by the worker and by the firm's president (witness).

---

## Analysis

---

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.

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.

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.

Payment by the hour, 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. Also, workers are assumed to be employees if they are guaranteed a minimum salary or are given a drawing account of a specified amount that need not be repaid when it exceeds earnings.

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.

The 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.

We have considered the information provided by both parties to this work relationship. In this case, the firm retained the right to change the worker's methods and to direct the worker to the extent necessary to protect its financial investment and business reputation and to ensure its customers' satisfaction and that its contractual obligations were met. The worker was not operating a separate and distinct business and as prohibited by the noncompetition clause; 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. 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 owner of the business. 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.

## 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.