

SS-8 Determination—Determination for Public Inspection

Occupation

02DBT Director of New Business Development

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 director of new business development, testing, research, marketing, and convention sales demos in tax years 2017 and 2018, for which she received Form 1099-MISC.

The firm's response was signed by the HR/payroll manager. The firm's business is the manufacturing, production, and sales of hydrox/air purification systems. The worker provided services as sales person selling the firm's product.

The worker stated she was flown to the corporate office location to learn about equipment, how to fill out forms, given the marketing documents, and the power point training guide. Her job assignments were filtered down to her from her boss. The firm determined the methods by which the worker's services were performed; and, any problems or complaints encountered by the worker were directed to the firm for resolution. The worker was required to report expenses, invoices, testing, and research information. The services were rendered from her home, the storage facility, convention centers, and demo locations. She started at 9am answering emails, making phone calls, and working the tasks given by her boss. She was required to perform the services personally; and, any additional personnel were hired and paid by the firm.

According to the firm, the worker was not given any specific training and/or instructions. The job assignments consisted of a territory that worker was supposed to make sales in and also attend trade shows. The firm determined the methods by which the worker's services were performed. Any problems or complaints were directed to the firm's VP of sales and marketing. The worker was required to submit weekly sales reports of who, what, and where product was sold. The worker was required to perform the services personally, with any additional personnel being hired and paid by the firm.

The worker indicated the firm provided demo machines, computer cell phone allowance, office supplies, and clothes. The worker did not lease equipment, space, or a facility; she incurred expenses for a higher vehicle payment and extra home expenses and was reimbursed for cell phone, insurance, travel, office supplies, clothing, food, equipment, and mileage. The worker was paid a salary and commissions; the customers paid the firm. The worker was not covered under the firm's workers' compensation insurance policy. She responded that her financial risk in this work arrangement would be the loss of her vehicle. The worker did not establish level of payment for services provided or products sold – the firm did.

The firm acknowledged providing equipment and materials. The worker furnished her cell phone, supplies, and transportation and incurred expenses for mileage and cell phone; the firm reimbursed for cellphone, mileage, meals, and supplies. The worker did not lease equipment, space, or a facility. The worker was paid a salary with the opportunity for commission; the customers paid the firm. The worker's economic risk would be a result of loss or damage of equipment. The firm established the level of payment for services provided or products sold.

Both parties concur there were no benefits extended to the worker, that either party could terminate the work relationship without incurring a liability or penalty, and that the worker was not performing same or similar services for others during the same time frame. The firm did all advertising and provided the worker with business cards. The firm terminated the work relationship. The firm and worker provided a copy of the IC agreement made 12/11/2017; the worker was to provide and assist with sales and the introduction of the firm's products, with an annual salary, and \$XX per month for medical insurance allowance, and commissions.

The worker provided a copy of the Employment Offer Letter dated Nov. 15, 2017 as director of new business development, that outlined the following: reporting directly to her immediate supervisor, the annual salary paid bi-weekly and the commission rates, the reimbursement of approved out-of-pocket expenses, and after the 90-day waiting period she would be eligible to enroll in company benefits. A copy of the Confidentiality and Nondisclosure agreement, copies of the pay stubs which reflected commission paid and expense reimbursement, and a copy of the letter of termination dated 8/17/2019 with an effective date of 9/1/2018 were also provided.

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.

Training a worker by requiring an experienced employee to work with the worker, by corresponding with the worker, by requiring the worker to attend meetings, or by using other methods, indicates that the person or persons for whom the services are performed want the services performed in a particular method or manner. This is true even if the training was only given once at the beginning of the work 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.

If the person or persons for whom the services are performed ordinarily pay the worker's business and/or traveling expenses, the worker is ordinarily an employee. An employer, to be able to control expenses, generally retains the right to regulate and direct the worker's activities.

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.

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 firm's 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; 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.