

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

Occupation

02OFF Office Workers

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 firm is in the business of real estate sales. The worker was a licensed real estate agent but was not engaged in that capacity. She was engaged to complete real estate transaction paperwork and to show clients property on an as-needed basis as the firm's director of operations. She received a 2017 Form 1099-MISC for her services. There was no written agreement.

According to the worker, the firm's previous director provided training along with detailed daily instructions from the firm. However, the firm noted that the worker required very little instruction as she was a real estate agent. Both parties agreed that the worker received her work assignments from the firm via phone, email, or text. Each party indicated that the other determined the methods by which the assignments were performed but both agreed that the firm would be contacted if any issues or problems arose. The worker submitted a list of completed tasks at the end of the day; the firm noted that she submitted the hours that she worked. The worker indicated that she worked certain weekdays and weekends as needed. She worked essentially for the whole day depending on the workload. The firm noted that she worked when she was available. Both parties agreed that she worked mostly at the firm's office location as well as on the road for errands and clients and at her home. Both also agreed that the worker was to provide the services personally.

Both the firm and the worker agreed that the firm provided the keys to office, workspace, desk, chair, supplies, and credit card. The worker supplied a laptop as well as a phone and car. The real estate broker provided computers and copiers. The worker was reimbursed for gas and mileage when showing properties to the firm's clients. Both parties agreed that she was paid an hourly rate; she had no other economic risk other than loss/damage to her equipment. The customer paid the firm. Each party noted that the other established the level of payment for services; the firm added that she controlled how much work she accepted and performed.

Both the firm and the worker agreed that there were no benefits and that either party could terminate the relationship without incurring a liability. Both agreed that the worker did perform similar services for others. The worker noted that she had a verbal agreement acknowledging that any of her outside work would not overlap or conflict with the firm's. The worker input information into MLS, prepared for open houses and generated flyers on behalf of the firm. The relationship has ended.

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## Analysis

In this case, though the worker was a licensed real estate agent, she was not operating in that capacity. She did not meet the criteria outlined in Internal Revenue Code (Code) section 3508 (paid commissions and performing under a written agreement that stated the worker will be treated as an independent contractor for federal tax purposes) in order for the worker to be considered a non-employee of the firm for federal employment tax purposes.

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. The relationship of the worker and the business must be examined. 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 should be considered. 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.

Factors that illustrate whether there is a right to control how a worker performs a task include training and instructions. 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. The firm engaged the worker to provide certain services to support its real estate sales operations. The worker already had experience in this line of work and also received some initial training from the previous director of operations for the firm. While the worker may have been given some latitude regarding her work schedule, it would be unreasonable to assume that she could pick and choose her work assignments based on the nature of real estate transactions and timelines. Evidence was provided that illustrated the firm's direction of the worker's activities as well as the fact that she reported her activities to the firm.

Normally, the establishment of set hours of work by the person or persons for whom the services are performed is a factor indicating control, however, 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. Most of the worker's services for the firm were performed at the firm's office location, also a factor that suggests the firm's ability to retain control over the worker. The importance of this factor depends on the nature of the service involved and the extent to which an employer generally would require that employees perform such services on the employer's premises. Control over the place of work is indicated when the person or persons for whom the services are performed have the right to compel the worker to travel a designated route, to canvass a territory within a certain time, or to work at specific places as required. In this case, the worker also performed some of her services off-site such as client showings performed for the firm. Throughout the time period involved, the worker's services were continuous. 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.

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. The worker had no significant investment. The term "significant investment" does not include tools, instruments, and clothing commonly provided by employees in their trade; nor does it include education, experience, or training. 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.

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. There were no benefits and there was no written agreement. The worker was engaged for her real estate experience to provide related services for the firm's real estate sales operations. When doing so, the worker was not engaged in a separate business venture. The fact that she had a real estate license did not make her self-employed when she was not selling real estate as the agent or paid commissions for such. 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.

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.

Please see Publication 4341 for guidance and instructions for firm compliance.