

**SS-8 Determination—Determination for Public Inspection**Occupation  
02REC RecruiterDetermination:  
☒ 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 his work status as a recruiter in tax years 2016 and 2017, for which he received Form 1099-MISC. In this capacity, he helped create a recruiting process and assisted with HR support, providing services 40 hours a week in the office. His job was to recruit sales and training specialists to represent multiple beauty brand clients in stores. The firm's business is described as partnering with multiple beauty brands in the beauty industry and hiring sales and training specialists to act as a vendor for their clients and visit stores to increase sales and support staff.

The firm's business is an out-sourced management firm specializing in the beauty industry. The worker provided services as a recruiter. The firm does not recruit for its main source of business; but, provides sales support in-store for beauty brands. The firm indicated there was an Independent Contractor Agreement between the parties; however, the file is not available.

The worker stated he was trained in the overall process, including the technology used to store applications and new candidates, and to learn the 'ins and outs' in order to assist in other roles. His job assignments were a result of the firm signing a new contract with a new client and there were stores in which that client requested sales and training support. His main task was to hire the sales and training specialists in these client-stores. The firm determined the methods by which he performed his services. Any problems or complaints encountered by the worker were directed to the firm for resolution. His services were rendered on the firm's premises from 9 am to 6 pm Monday through Friday, with overtime on most days. The worker was required to perform the services personally.

According to the firm, no specific training and instructions were given since the worker had extensive experience; the firm told him what type of candidates were being sought. The job assignments were determined by the worker; and it was the worker that determined the methods by which he performed his job functions. The firm only provided the general project description. Any problems or complaints encountered by the worker were resolved by the worker and reported to the National Sales Manager. No reports were required of the worker, as the firm tracked the worker's execution through HRIS system and Paylocity. The worker provided his services at his home and the firm's location. The firm indicated the worker was not required to perform the services personally; any additional personnel were hired and paid by the firm.

The worker responded that the firm provided him with a laptop and writing materials. The worker furnished nothing, he did not lease equipment, space, or a facility, and he did not incur expenses. The firm paid the worker a salary of \$XX/month; the clients paid the firm. The worker indicated he was not covered under the firm's workers' compensation insurance policy. His risk for a financial loss in this work relationship was considered not applicable. The worker did not establish the level of payment for services provided or products sold.

The firm stated the worker was provided with an office, desk, office supplies and computer and monitor; the worker furnished his contact list of candidates and a cellphone. The worker did not lease equipment, space, or a facility. The firm indicated he incurred expenses for mailing and postage, cellphone, utilities, and internet access for his home office. The firm paid a flat project rate of \$XX per month. 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 responded that the worker did not establish level of payment for services provided or products sold; he negotiated his pay for the project.

Both parties acknowledge there were no benefits extended to the worker and that either party could terminate the work relationship without incurring a liability or penalty. The firm indicated the worker was performing same or similar services for others during the same time frame and the firm's approval was not required as there was no contract prohibiting the worker from providing services to others. The worker disagreed; he stated he was not performing same or similar services for others during the same time frame in his position as the firm's official national recruiter. The firm responded the worker was a contract recruiter for a 90-day project, which was extended to 120 days and then ended. The worker was told by firm's president the arrangement was not a good fit and he was verbally let go.

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## Analysis

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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.

If the work is performed on the premises of the person or persons for whom the services are performed, that factor suggests control over the worker, especially if the work could be done elsewhere. Work done off the premises of the person or persons receiving the services, such as at the office of the worker, indicates some freedom from control. However, this fact by itself does not mean that the worker is not an employee. 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.

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.

Lack of significant investment by a person in facilities or equipment used in performing services for another indicates dependence on the employer and, accordingly, the existence of an employer-employee relationship. 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.

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 clients' 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.