

SS-8 Determination—Determination for Public Inspection

Occupation

02SAL Business/Corporate Services/Offices/Sales

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**

It is our usual practice in cases of this type to solicit information from both parties involved. Upon the submission of the Form SS-8 from the worker, we requested information from the firm concerning this work relationship. The firm responded to our request for completion of Form SS-8.

From the information provided the firm is in the business of selling real estate for different real estate new construction developments and the worker was engaged from May 2017 to January 2018 as an independent licensed sales person working out of a sales trailer on a job site for new construction. The firm believes the worker was an independent contractor because he was a licensed real estate sales person with specialized knowledge, he paid for his own license and training and education, he was compensated by commission, he worked independently, and he could work for others. The firm reported the worker's 2017 earnings on a Form 1099-MISC.

The worker received general instruction about the seller's units for sale and he was provided an offering plan and information about the local area so he could sell units. The broker assigned the worker to the job-site and the worker made calls to people who had previously expressed interest in purchasing a condominium as well as with people who came to the site. The firm states the worker determined how he performed his services. The worker was required to personally perform his services at the sales trailer in one of the firm's development areas. The firm states the worker was not required to submit reports to the firm or attend meetings. The worker performed his services generally 10 a.m. to 5 p.m. several days a week. Certain days the worker worked by himself at the sales trailer and other days he worked with another sales person. The firm states the worker had control over what his daily duties would entail.

The firm states a third party provided the sales brochures, offering plan, forms, desk, and computer to worker in order to perform his services. The worker was required to maintain his real estate license and obtain any necessary continuing education as required by their state regulations. The firm states the worker was compensated on a commission basis and there was no guarantee of a minimum payment. The firm states the worker was eligible for a weekly draw which could not exceed expected commissions. The firm did not carry worker's compensation insurance on the worker. The firm states the worker did not have an opportunity to incur a loss as there was no salary to lose. The firm states the sponsor/seller established the level of payment for the services provided.

The firm states the worker was represented as a sales person to their clients. Either party could terminate the work relationship at any time without either party incurring a liability. The firm terminated the work relationship.

Analysis

There are three categories of statutory nonemployees: direct sellers, licensed real estate agents and certain companion sitters. Direct sellers and licensed real estate agents are treated as self-employed for all Federal tax purposes, including income and employment taxes, if:

- Substantially all payments for their services as direct sellers or real estate agents are directly related to sales or other output, rather than to the number of hours worked, and
- Their services are performed under a written contract providing that they will not be treated as employees for Federal tax purposes.

We did not find that the worker met the criteria for this code section; therefore, we had to look at common law.

As in this case and in almost all worker classification cases, some facts point to an employment relationship while other facts indicate independent contractor status. 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.

Evidence of control generally falls into three categories: behavioral control, financial control, and relationship of the parties, which are collectively referred to as the categories of evidence. In weighing the evidence, careful consideration has been given to the factors outlined below.

Factors that illustrate whether there is a right to control how a worker performs a task include training and instructions. In this case, The worker was experienced in this line of work and did not require training or detailed instructions from the firm. The need to direct and control a worker and his services should not be confused with the right to direct and control. The worker provided his services on behalf of and under the firm's business name rather than an entity of his own. The firm was responsible for the quality of the work performed by the worker and for the satisfaction of their clients. This gave the firm the right to direct and control the worker and his services in order to protect their financial investment, their business reputation, and their relationship with their clients.

The methods by which professional men and women work are prescribed by the techniques and standards of their professions. No layman should dictate to a lawyer how to try a case or to a doctor how to diagnose a disease. Therefore, the control of an firm over the manner in which professional workers shall conduct the duties of their positions must necessarily be more tenuous and general than the control over nonprofessional workers. Yet, despite this absence of direct control over the manner in which professional men and women shall conduct their professional activities, it cannot be doubted that many professionals are employees.

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. While the worker was required to obtain and maintain a real estate license, this not considered a 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.

"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 service recipient's regular business activities. 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. Both parties retained the right to terminate the work relationship at any time without incurring a liability.

There was no evidence presented nor found in this investigation that indicates that the worker had an investment in a business related to the services he performed for the firm and offering those services to the public. It should be noted that it is possible for a person to work for a number of people or firms concurrently due to financial need and the supporting of oneself and be an employee of one or all of whom engages him.

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.