

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

Occupation

02SAL Salespersons

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 distributing furniture to small furniture stores and the worker was engaged as an outside sales representative who would visit the firm's customers by telephone or by car to try and sell their products. The firm believes the worker was an independent contractor because he was paid a commission on sales, he had a home office and sales territory, he paid his own car and fuel, and he operated like his own business. The firm reported the worker's earnings on Forms 1099-MISC.

The firm states they provided no assignments to the worker as the worker needed to be a self-starter and build the sales territory. The worker was required to personally perform his services and the firm states he performed his services 50% of the time in his home and 50% of the time at customers' locations. The worker was required to notify the firm if any problems or complaints arose for their resolution. The worker was not required to submit reports to the firm or attend meetings. The firm states the worker would work from home and answer customer calls two (2) to three (3) days a week and two (2) to three (3) days a week he would travel from store to store.

The firm states the worker provided a car, telephone, fuel for the car, and a home office and they did not reimburse the worker for any of these expenses. The worker was paid on a commission basis and he was not guaranteed a minimum amount of pay. The clients paid the firm and the firm states the worker established the level of payment for the services provided. The firm believes the worker could incur a loss due to the risk of smaller pay if his sales were low.

The firm states the worker was paid sales volume so he would be paid even if he was on vacation. The firm states the worker performed similar services for others. The firm states the worker sold a mattress line and he could sell other non-conflicting lines. The firm states the worker was represented as an outside sales representative and he could use the business names of various manufactures they carried while performing services. Either party could terminate the work relationship at any time without either party incurring a liability. The firm terminated the work relationship in September 2016.

The firm provided partial copies of an unemployment decision and appeal decisions from their state's labor department regarding the denial of unemployment benefits to the worker as it pertains to services performed for them.

---

## Analysis

---

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 firm afforded the worker with a great deal of freedom while performing his services as the majority of his services were performed away from the firm's premises. With more and more workers working out of their home office and this becoming the reoccurring trend in the current workplace, this fact by itself, does not mean that the worker is not an employee. The worker provided his services on behalf of and under the firm's business name rather than an entity of his own as evidenced by business cards provided in this investigation. 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.

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. "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.

If a worker makes his or her services available to the general public and, in fact, performs similar services for a multiple of persons or firms, this is generally considered to be evidence that the worker is an independent contractor. However, no such evidence exists in this case. In this case, the worker did not advertise or represent himself to the public as being in the business of performing sales services for others. Nor did he perform such services for any other persons or firms. In fact, he performed his services for the taxpayer on a full-time basis, over an extended period of time.

If a firm has to make a worker "understand" or "agree to" being an independent contractor (as in a verbal or written agreement or the filing of a Form W-9), then the worker is not an independent contractor. An individual knows they are in business for themselves offering their services to the public and does not need to be made aware of, understand, or agree to be treated as an independent contractor for tax purposes.

Section 31.3121(d)-1(a)(3) of the regulations provides that if the relationship of an employer and employee exists, the designation or description of the parties as anything other than that of employer and employee is immaterial. Thus, if an employer-employee relationship exists, any contractual designation of the employee as a partner, co-adventurer, agent, or independent contractor must be disregarded.

Therefore, 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.

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.