

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

The firm is a retail orthodontic lab and dental product sales business. The firm engaged the worker verbally as an employee to perform administrative and sales services for the firm's business operation. The firm provided the worker with training on equipment and business operation procedures. The firm orally assigned the worker services to perform and required the worker to contact the firm regarding any problems or complaints for resolution. The firm required the worker to provide the firm with oral business activity reports and to perform the services during a firm established schedule at the firm's place of business. The worker performed the services personally at the firm's place of business. The firm indicated the worker was aware he would receive a Form 1099 for services performed the first 3 months.

The firm provided the business equipment, materials, and supplies. The worker did not lease equipment or space. The worker did not incur any business expenses. The firm reimbursed parking expenses and paid the worker an hourly wage plus commissions. The worker was not allowed any draws. The customers paid the firm. The firm did not carry workers' compensation insurance. The firm determined the level of payment for services and products sold.

There were no written contracts. The firm provided the worker with paid holiday benefits. The worker did not perform similar services for others or advertise as a business to the public. The worker sold dental products from the firm's place of business and advertised the firm's business with business cards. Both the firm and the worker retained the right to terminate the working relationship at any time without incurring any liability. The firm referred to the worker as a salesperson under the firm's business name to the customers. The relationship ended with a verbal termination notice.

Analysis

When a firm determines or retains the right to determine directly or through designation what, how, when, and where workers perform services an employer/employee relationship exists. For federal employment tax purposes, it is not necessary for firms to exert direct or continuous control nor that services be performed full-time on a fixed scheduled basis, it is sufficient that the firm retains the right to change the workers services, as they deem necessary for business purposes. This control may come from verbal instructions, training, meetings, reporting, as well as supervision. Also, the methods used by workers to perform services are not only controlled through verbal instructions but also by equipment, materials, and supplies provided. In this case, the firm not the worker had control over the methods and means used in the performance of the services. Probationary employees, even though they may not qualify for benefits, privileges, or seniority protection, still are considered employees for federal employment tax purposes. Payments made to them as compensation for services are wages subject to employment taxes. These facts evidence behavioral control by the firm over the services performed by the worker.

When a worker does not have a significant financial investment in a business requiring capital outlays with business risk an employer/employee relationship is evident. In this case, the worker had no significant financial investment in a business and did not incur any on-going business expenses. The firm had the business investment and control over profit and risk of loss with regard to the services the worker performed for the firm's business. These facts evidence financial control by the firm over the services performed by the worker.

There were no written contracts between the firm and the worker but an oral agreement was indicated. The issue of there being an oral agreement that the firm would not withhold taxes and issue a Form 1099 for payment for services would not make the worker to be an independent contractor. The autonomy of the working relationship would determine a worker's status. The worker personally performed services for the firm's business operation on a regular and continuous scheduled basis at the firm's place of business for a period of about 2 months under the firm's business name. The firm provided the worker with paid holiday benefits.

The firm and worker retained the right to terminate the working relationship at any time without incurring any liability. The right to discharge a worker at any time without incurring a liability for termination is a factor indicating that the worker is an employee and the person possessing the right is an employer. An employer exercises control through the threat of dismissal, which causes the worker to obey the employer's instructions. An independent contractor, on the other hand, cannot be fired without a liability so long as the independent contractor produces a result that meets the contract specifications. Likewise, if the worker has the right to end his or her relationship with the person for whom the services are performed at any time he or she wishes without incurring liability, that factor indicates an employer-employee relationship.

Based on the autonomy of the working relationship we have determined the worker was an employee under common law.