

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

Occupation

02SAL Telemarketer

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 worker initiated the request for a determination of his work status as a professional telemarketer in tax years 2007 through 2018. The firm's business is described as telemarketing and solicitation.

The firm's response was signed by the president. The firm's business is described as telemarketing to solicit donations for various fraternal order of police youth activities. The worker performs services as a 'phone man' - he solicits donations to contracted entities on behalf of the firm, utilizing prior donor lists and telephone cold calling.

The worker responded that the firm determines the policies and rules of solicitation, the dates, times, and locations, and the sales pitch to be used (he provided a copy of a script). The job assignments are given as to business and people to be contacted. The firm determines the methods by which the

worker's services are performed. The worker directs any problems or complaints to the firm for resolution. He performs the services from 9 am to 9 pm minus lunch and breaks at various locations within the state. The worker is not required to perform the services personally; any additional personnel are hired and paid by the firm.

According to the firm, the worker only receives a 'pitch page' which contains the instructions relating to compliance with state fundraising laws and regulations. The job assignments are past donor lists given by the firm and part of the telephone book for cold calling. The worker determines the methods by which the are performed. Any problems or complaints encountered by the worker are directed to the fund raising sponsor (recipient of the funds) regarding program questions or concerns and the firm is contacted with technical questions or concerns such as a telephone line becomes inoperable. The workers are given a daily worksheet to track their own notes on collection amounts to be reported to the office secretary who tracks daily donations and financial reporting to sponsors. The worker's services are rendered from 9 am to 9 pm with lunch breaks at noon and 5pm at the temporary office locations in each city where the sponsor is located. The firm indicates the worker is not required to perform the services personally:

any additional personnel are hired and paid by the worker.

The worker states the firm provides the phone lines and office supplies. The worker furnishes nothing, he does not lease equipment, space, or a facility, and does not incur expenses in the performance of the job other than for gas and lodging. The firm acknowledged that the firm provides office space, a desk, phone service, the daily worksheet, and call lists. The worker furnishes the physical phone, office supplies, and a chair. The firm indicated the worker does not lease equipment and does not incur expenses in the performance of the job other than for the phone and other office equipment and supplies that meet his personal needs. Both parties concur the worker is paid a commission: and, the customers pay the firm. The worker is not covered under the firm's workers' compensation insurance policy. The worker and firm agree the worker is not at risk for a financial loss in this work relationship and that he does not establish the level of payment for services provided or products sold.

There are no benefits extended to the worker. Either party can terminate the work relationship without incurring a liability or penalty. The worker is not performing same or similar services for others during the same time frame. The worker has no responsibility to solicit new customers. The leads to prospective customers are provided by the firm.

## Analysis

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.

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The establishment of set hours of work by the person or persons for whom the services are performed is a factor indicating control. 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.

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. Also, if the firm has the right to control the equipment, it is unlikely the worker had an investment in facilities.

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 is 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 retains 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 customers' satisfaction and that its contractual obligations are met. The worker is not operating a separate and distinct business; the worker does not have an investment of capital in a business or assume business risks, and therefore, he does 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 is not engaged in an independent enterprise, but rather the services performed by the worker are a necessary and integral part of the firm's business.

### CONCLUSION

Based on the above analysis, we conclude that the firm has the right to exercise direction and control over the worker to the degree necessary to establish that the worker is a common law employee, and not an independent contractor operating a trade or business.