

## SS-8 Determination—Determination for Public Inspection

Occupation

02 SAL Insurance Agent

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 an insurance agency. The worker was engaged by the firm as an insurance agent. The firm reported the worker's remuneration on Forms 1099-MISC for 2014 and 2015.

Information from the parties supports that the firm relied upon the worker's prior training and experience to perform his services. The firm provided the worker with his work assignments. If problems or complaints occurred, the worker contacted the firm for resolution. The worker submitted reports of policies he sold. He determined his hours of work. The worker worked on the firm's premises, working varied hours each week. He was required to perform his services personally.

The firm provided the workspace, including a desk, computer, and phone. The worker did not lease equipment or space, or incur expenses in the performance of his services. The firm paid the worker at an hourly rate plus commissions. It did not cover him under workers' compensation. Customers paid the firm directly. Neither party indicated an investment by the worker in the firm or a related business, or the risk of the worker incurring a financial loss beyond the normal loss of compensation.

The firm did not make benefits available to the worker. The worker provided similar services for others during the same time period. He did not advertise his services or maintain a business listing. Both parties reserved the right to terminate the work relationship without incurring a penalty or liability, and in fact, the worker terminated the work relationship.

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## Analysis

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Workers in certain occupations will not be treated as employees for FICA, FUTA, or federal income tax withholding purposes provided they meet certain qualifications. These workers are referred to as "statutory non-employees." IRC 3508(b)(2) provides that, for all IRC purposes, direct sellers are statutory non-employees if the following qualifications are met:

- a. The worker is engaged in the sale of consumer products in the home or in other than a permanent retail establishment; engaged in delivering or distribution of newspapers; or engaged in sale of consumer products for resale in the home or in other than a permanent retail establishment.
- b. Substantially all of such worker's remuneration for services is directly related to sales or other output rather than to the number of hours worked.
- c. A written contract exists between the worker and the taxpayer for which services are being performed that provides that the worker will not be treated as an employee for federal tax purposes.

In this case, substantially all of the worker's remuneration for services is not directly related to sales or other output, and there is no written contract between the parties. It appears that Section 3508 does not apply in this case.

Factors that illustrate whether there was a right to control how a worker performed a task include training and instructions. In this case, while the firm relied upon the worker's prior training and experience to perform his services, it was responsible for resolving any problems or complaints that may have occurred, showing it retained the right to change the worker's methods and to direct the worker to the extent necessary to protect its financial investment. The worker was required to perform his services personally, meaning he could not engage and pay others to perform services for the firm on his behalf. 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. These facts show that the firm retained behavioral control over the services of the worker.

Factors that illustrate whether there was 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. 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 firm paid the worker at an hourly rate, plus commissions. Payment by the hour generally points to an employer-employee relationship. The opportunity for higher earnings or of gain or loss from a commission arrangement is not considered profit or loss. These facts show that the firm retained control over the financial aspects of the worker's services.

Factors that illustrate how the parties perceived 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 were part of the service recipient's regular business activities. In this case, the worker performed his services on a continuing basis. He performed his services under the firm's name. 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. 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. The worker performed similar services for others during the same time period; however, it is possible for a person to work for a number of people or firms concurrently and be an employee of one or all of them. Although the firm did not provide benefits to the worker, the worker terminated the work relationship without incurring a liability. 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. These facts show that the firm retained control over the work relationship and services of the worker.

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.