

**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 sales business for cabinetry, flooring, and stone materials. The worker was engaged to interact with customers, generate sales and new designs for kitchen and bath cabinetry. She received a 2017 Form 1099-MISC for her services. There was no written agreement.

Both the firm and the worker agreed that the worker was trained on the design software; the worker added that she was also trained on the retail products, how to speak to customers, and how to run the office as well. The firm gave the worker her work assignments directly. Both parties agreed that the firm determined the methods by which the assignments were performed (though the firm noted that worker could change those methods) and would be contacted if any issues or problems arose. The worker provided verbal reports; the firm noted that design, quotes, and purchase orders were produced as a team. The worker had set scheduled hours at the firm's location. The firm noted that there was some flexibility of hours allowed but regular hours were encouraged to provide 'coverage' for the firm's operations. There were no meetings. The worker was to provide the services personally. Only the firm would hire and pay any substitute workers.

Both the firm and the worker agreed that the firm provided a workplace, all office supplies, laptop, and software. Both parties agreed that the worker was paid per hour as well as commission and had no other economic risk. The firm noted that there were advances but rarely. The customer paid the firm. The firm established the level of payment for services.

There were insurance benefits and bonuses according to the firm. Both agreed that either party could terminate the relationship without incurring a liability and that the worker did not perform similar services for others. The worker performed her services under the name of the firm. The firm noted that its operation is dependent on walk-ins or call-ins for quotes. The worker sold cabinets in the firm's retail establishment. The relationship ended when the worker quit.

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## Analysis

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In determining whether an individual is an employee or an independent contractor under the common law, all evidence of both control and lack of control or independence must be considered. The relationship of the worker and the business must be examined. Facts that show a right to direct or control how the worker performs the specific tasks for which he or she is hired, who controls the financial aspects of the worker's activities, and how the parties perceive their relationship should be considered. As is the case 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.

Factors that illustrate whether there is a right to control how a worker performs a task include training and instructions. In this case, the firm retained the right to change the worker's methods and to direct the worker to the extent necessary to protect its financial investment. The firm provided training to the worker, even if just initially. Training a worker by requiring an experienced employee to work with the worker, by corresponding with the worker, by requiring the worker to attend meetings, or by using other methods, indicates that the person or persons for whom the services are performed want the services performed in a particular method or manner. This is true even if the training was only given once at the beginning of the work relationship. The firm mentioned that the worker's hours were flexible but hours were scheduled for coverage. 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. While the worker's services were for a temporary period of time, those services were continuous. A continuing relationship between the worker and the person or persons for whom the services are performed indicates that an employer-employee relationship exists. A continuing relationship may exist where work is performed in frequently recurring although irregular intervals.

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. The firm had the investment in its retail operation. The worker received an hourly rate of pay and commission; she had no other economic risk other than loss of that compensation as she had no capital investment. 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.

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. There were some benefits and there was no written agreement. The fact that the firm's business was in a start-up phase would not be a determinative factor in the classification of the worker. The worker was engaged to provide customer services as well as sales and design services for the firm's retail operation. When doing so, the worker was not engaged in an separate business venture. The fact that her services were temporary did not establish a business presence. Her services were necessary and integral to the firm's continuing operations. 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.

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.

Please see Publication 4341 for guidance and instructions for firm compliance.