

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 in the business of providing home remodeling services. The worker was engaged as a representative who scheduled in-home appointments. He received a Form 1099-MISC for his services in 2016 and 2017. He continued to work in 2018 as well. There was a written agreement.

According to the worker, the firm provided one-on-one instructions on how to sell products; however, the firm indicated that there were free seminars offering training/instructions. The worker was given his assignments from the firm via phone or text. Each party indicated that the other determined the methods by which the assignments were performed; but both agreed that the firm would be contacted if any issues or problems arose. Both parties agreed that the worker submitted customer lead reports. The worker's responsibility in soliciting new customers was to schedule free estimates. He would approach customers with information about the firm and its products. He generated his own leads and relayed the information to the firm. Both parties agreed that all 'orders' were approved by and submitted to the firm. Each indicated that the other determined the worker's territory. He 'sold' the appointments for remodeling projects at a kiosk in a big box store. The firm noted that the worker picked his own schedule and would tell the firm when he was available. There were no required meetings. Both agreed that the worker was to provide the services personally.

The firm provided shirts; the worker added that they also provided tables, displays and pamphlets. The worker supplied pens, paper and a cell phone. The worker received commission based on home appointments, scheduled and kept by homeowners. The worker indicated that he received a salary along with a commission and that he was guaranteed a minimum amount of compensation weekly. The firm noted that the worker had a drawing account for advances. The customer paid the firm. The firm established the level of payment for services.

Both the firm and the worker agreed that there were no benefits and that either party could terminate the relationship without incurring a liability. The worker did not perform similar services for others though the firm noted he could for non-conflicting products. The firm noted that he was a Brand Ambassador; the worker noted that he was a representative of firm. The relationship ended when the worker quit.

Analysis

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. 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 home remodeling services and engaged the worker to set-up in-home appointments with potential customers. Initially, the worker filled out an application; it also would be unreasonable to assume that he received no instructions regarding how to solicit in-home appointments from a kiosk. The worker worked when available and notified the firm of his availability. While set scheduled hours usually are an indication of control by a firm, 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. The worker's services for the firm were all performed where designated by the firm, also a factor that suggests the firm's ability to retain control over the worker. Control over the place of work is indicated when the person or persons for whom the services are performed have the right to compel the worker to travel a designated route, to canvass a territory within a certain time, or to work at specific places as required. In addition, the fact that the worker was required to provide the services personally indicated that the firm was interested in how those services were performed as well as the result. The worker's services were continuous throughout the years involved. 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 worker could make more or less depending on how much time he worked. The opportunity for higher earnings or of gain or loss from a commission arrangement is not considered profit or loss. In addition, while the worker noted that he received a salary, the firm noted that he received a 'draw.' The worker was guaranteed a minimum amount and was paid weekly. Evidence provided supported the fact that he was paid weekly. 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 no benefits and there was a written agreement. However, the firm's belief 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.

The worker was engaged to set in-home appointments for the firm's home remodeling operation. When doing so, the worker was not engaged in a separate business venture. The fact that his services were based on his availability and not performed at the firm's premises did not make him self-employed. 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 for the entire work relationship 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.