

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 worker initiated the request for a determination of his work status in 2015 having received Form 1099-MISC. He performed producer and sales functions and provided regular sales and progress reports. His title was Business Development and Executive Producer over his projects for the firm. The firm's business is described as motion picture post production.

The firm's response was signed by the CEO. The firm's business is described as services and equipment for cinemas. The worker was hired as a freelance consultant and salesperson; he was a '1099' employee with no tax withholding, with an understanding that all tax liability was the worker's responsibility.

The worker indicated that no training and instructions were given since he is a long-time professional in post-production. His work assignments were as a result of his contact with studios and the general manager. It was the on-going sales and relationships that determined the methods by which the worker's services were performed. Any problems or complaints encountered by the worker were directed to the firm's GM and owner for resolution. His services were rendered 70% of the time from his home office and the other 30% from firm's office. The worker was required to perform the services personally.

The firm provided post production film, film recorder, film lab, and film projection. The worker furnished a computer, phone, home office, and car. He did not lease equipment, space, or a facility. The worker stated he was reimbursed for any relevant expenses such as travel and business meals. The firm paid him a salary and commissions; the customers paid the firm. The worker was not covered under the firm's workers' compensation insurance policy. The worker stated he was not at risk for a financial loss in this work relationship. The worker indicated that he worked out the sales deals; but, the pricing was agreed upon by the owner, GM, and himself.

The worker responded that there were no benefits extended to him other than paid holidays. Either party could terminate the work relationship without incurring a liability or penalty. The worker was not performing same or similar services for others during the same time frame. The finished product was shipped from the lab to the clients. The worker stated he was represented by the firm as 'heading up the business and development projects that were filming out for U.S. studios'.

The firm indicated that records and HR personnel from the time period in question are no longer available. The firm did respond that the worker was not required to perform the services personally. The firm acknowledged the worker did not lease equipment, space, or a facility. The worker did incur expenses in the performance of the job for travel, miles, meals and parking and was reimbursed by the firm. The firm submitted copies of the expense reports and receipts for mileage, parking, meals, one-day event badge, and hotel accommodations. The firm responded the worker was paid a commission. The firm provided documentation that included a revised offer: \$XXXX/week and going forward would be \$ZZZZ per year equaling \$YYYY per month invoiced every two weeks for professional consulting services for the firm. The clients paid the firm. The worker was covered under the firm's workers' compensation insurance policy. The firm responded that the worker established level of payment for services provided or products sold.

There firm stated there were no benefits extended to the worker and either party could terminate the work relationship without incurring a liability or penalty. The firm noted the worker was not performing same or similar services for others during the same time frame. The worker was referred to as a sales representative with responsibilities to solicit new customers. All orders were submitted to and subject to the firm's approval.

The firm provided emails between the worker and firm as to the worker's 'invoicing', as well as, sales levels and commissions; the worker had an email address through the firm. The firm provided copies of commission checks as well as 'base pay' checks. The Sales Contractor Agreement addressed the retainer of \$XXXX/week for sales support activity and project management, commission of W% on gross sales and then commission sales percentage increases as yearly gross sales increase, as wells as the expenses related to sales activity that could be reimbursed (mileage, parking, entertaining, phone, etc.).

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.

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.

A requirement that the worker submit regular or written reports to the person or persons for whom the services are performed indicates a degree of control.

If the person or persons for whom the services are performed ordinarily pay the worker's business and/or traveling expenses, the worker is ordinarily an employee. An employer, to be able to control expenses, generally retains the right to regulate and direct the worker's business activities.

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.

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.

We have considered the information provided by both parties this work relationship. 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 and business reputation and to ensure its customers' satisfaction and that its contractual obligations were met. The worker was not operating a separate and distinct business; 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. 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 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.

CONCLUSION

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.