

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 submitted a request for a determination of worker status in regard to services performed for the firm from October 2017 to December 2017 as a customer service worker. The worker's additional information stated the work relationship ended in August 2018, when he resigned. The firm issued the worker Form 1099-MISC for the years in question. The worker filed Form SS-8 as he believes he erroneously received Form 1099-MISC.

The firm's response states it is a sales, design, and service company that designs, produces, and sells out-door equipment to retailers. The worker was engaged as a sales and service representative. The work done by the worker included presenting product to retailers, communicating with retailers and factories, and handling client customer service issues on an as-needed basis. Work hours varied from two to ten per day depending on the need. The worker was classified as an independent contractor as he was free to represent other lines and products and set his own schedule; he could refuse work if he chose not to work at a particular time. Work was done on the worker's schedule. There was no written agreement between the parties.

The firm stated it provided an introduction to the products, construction of the products, and sales goals and plans were presented to the worker. The firm trained the worker on how to respond to complaints. The firm provided work assignments, as needed, by phone. Work assignments also came directly from customers and retailers. The worker was shown the correct method of work. If the worker was unable to resolve problems, the firm was contacted. The firm required the worker to provide telephonic reports regarding sales or customer service issues. The worker's daily routine varied based on customer need. Services were performed at the firm's premises and at various markets, as needed. There were no official meetings. As a small company, issues were most often dealt with by phone. The firm required the worker to personally perform services. The worker stated the firm provided on-the-job training. The firm determined the methods by which assignments were performed and assumed responsibility for problem resolution.

The firm stated it provided a cell phone and sales materials. The worker provided his own vehicle. If it was not operable, the firm provided a vehicle to drive. The worker did not lease equipment, space, or a facility. The worker did not incur expenses in the performance of services for the firm. Customers paid the firm. The firm paid the worker a base salary plus possible bonuses if sales goals were reached. The firm guaranteed the worker a minimum amount of monthly pay. There was no official drawing account for advances. The firm did not carry workers' compensation insurance on the worker. The worker bore no economic or physical risk of loss. The firm established the level of payment for the services provided or the products sold.

The firm stated benefits were not provided to the worker. The work relationship could be terminated by either party without penalty. There was no agreement prohibiting competition between the parties. It is unknown if the worker advertised. The firm represented the worker as an outside sales representative to its customers. The work relationship ended when the worker quit. The worker stated the benefits of paid vacations, sick pay, and paid holidays were made available. He did not perform similar services for others. The firm represented him as an employee to its customers. Services were performed under the firm's business name.

The firm stated the worker was to increase existing customer sales and seek new clients/outlets for sales. The worker was responsible for finding his own leads. There were no reporting requirements pertaining to leads. Terms and conditions of sales varied based on the volume of the end user. Orders were submitted and subject to the firm's approval. There were no set territories. The worker did not pay for the privilege of serving customers. Sales occurred over the phone and by visiting retail locations. Items sold included umbrellas, tents, chairs, etc. The worker stated the work consisted of customer service calls for patio umbrellas.

Analysis

Generally, the relationship of employer and employee exists when the person for whom the services are performed has the right to control and direct the individual who performs the services, not only as to what is to be done, but also how it is to be done. It is not necessary that the employer actually direct or control the individual, it is sufficient if he or she has the right to do so.

Section 31.3121(d)-1(a)(3) of the regulations provides that if the relationship of an employer and employee exists, the designation or description of the parties as anything other than that of employer and employee is immaterial. Thus, if an employer-employee relationship exists, any contractual designation of the employee as a partner, coadventurer, agent, or independent contractor must be disregarded.

Therefore, a statement that a worker is an independent contractor pursuant to a written or verbal 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. Furthermore, whether there is an employment relationship is a question of fact and not subject to negotiation between the parties.

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. In this case, the firm provided training and instruction in the method by which work assignments were to be performed. The firm also provided work assignments, required the worker to report on sales and customer service issues, and ultimately assumed responsibility for problem resolution. These facts evidence the firm retained the right to direct and control the worker to the extent necessary to ensure satisfactory job performance in a manner acceptable to the firm. Based on the worker's education, past work experience, and work ethic the firm may not have needed to frequently exercise its right to direct and control the worker; however, the facts evidence the firm retained the right to do so if needed.

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. In this case, the worker did not invest capital or assume business risks. 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. As acknowledged by the firm, the worker did not incur economic loss or financial risk. Based on the guaranteed fixed monthly rate of pay arrangement the worker could not realize a profit or incur a loss.

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. 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. Both parties retained the right to terminate the work relationship at any time without incurring a liability. There is no evidence to suggest the worker performed similar services for others as an independent contractor or advertised business services to the general public during the term of this work relationship. The classification of a worker as an independent contractor should not be based primarily on the fact that a worker's services may be used on a temporary, part-time, or as-needed basis. As noted above, common law factors are considered when examining the worker classification issue.

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.

The firm can obtain additional information related to worker classification online at www.irs.gov; Publication 4341.