

SS-8 Determination—Determination for Public Inspection

Occupation

02SAL Customer Service/Sales

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 wholesaling home care systems. The worker was engaged to canvass an area, set appointments, and give in-home demonstrations thereby generating sales. He received a 2017 Form 1099 for his services; he also provided services in 2018 as well. There was no written, signed agreement between the parties that met the statutory nonemployee criteria of direct seller.

The following are the criteria summarized: the worker must be engaged in the sale of consumer products in the home; all of the worker's remuneration for services is directly related to sales or other output; and a written contract exists that provides that the worker will not be treated as an employee for federal tax purposes.

The worker was trained by the firm on how to demonstrate the machine. The firm noted that he attended an unpaid voluntary orientation as well as signed agreements to be associated with the firm. The worker received his work assignments daily after the morning meetings. The firm noted that he could accept or reject leads provided by the firm. Each party indicated that the other determined the methods by which the assignments were performed and would be contacted if any issues or problems arose. There were weekly stat reports submitted by the worker on Mondays to keep a record of how many demonstrations were performed, for payment and improvement reasons. The firm noted that product warranties were signed by the consumer and worker and then sent to the manufacturer. The worker reported each day for morning meetings, then loaded the inventory and supplies; he traveled in the company van to work in a specified area. He set appointments, performed demos and returned early in the evening. The firm noted that the worker had no set hours and could work as much or as little as he wanted. His time was split equally between the firm's location and customers' homes. The meetings were mandatory for bonuses though the firm disagreed that the meetings were mandatory. The worker was required to provide the services personally with only the firm hiring and paying any substitutes; the firm disagreed.

The firm provided the duffle bag, educational materials, cleaners, company van, office, inventory, sales contracts, business cards, product info, and name badges. The worker incurred expenses to comply with the dress code and was not reimbursed. He was paid commission and was guaranteed a minimum amount; he also indicated that if he met a demo quota, he would receive a base monthly salary. He had no other economic risk. The customer paid the firm. The firm established the level of payment for services as well as provided the home care system to the worker on a consignment basis.

The worker would attempt to get his own new customers with the leads coming from the firm and the worker. The worker would report all leads to the firm to determine if they were qualified leads. Terms and conditions of the sale would be to wait for a number of specified hours after payment was made to the firm. All orders were submitted to and approved by the firm.

There were no benefits besides bonuses. Either party could terminate the relationship without incurring a liability. The worker did not perform similar services for others. He was presented as a representative of the firm. The relationship has ended.

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. 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 initial training and instructions to the worker. Information was presented showing the firm's requirements for bonuses based on sales as well as attendance at morning meetings. There was a list of what not to wear as well as the demo sequence to use. 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. While there were no formal set scheduled work hours, morning meetings were held at specified times prior to the worker traveling to an area designated by the firm to canvass for appointments, and perform in-home demonstrations. Transportation was furnished by the firm indicating that the worker could not come and go as he pleased. 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. The worker had to report his activities to the firm, as well as work six days a week, in order to meet the quota for a base monthly salary. 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. The worker provided his services to the firm on a continuous basis for the time period 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 had no significant investment as the product was provided by the firm on consignment. 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. While both parties agreed that the worker was paid commission, there was a guaranteed minimum as well as the opportunity to earn a base monthly salary. Workers are assumed to be employees if they are guaranteed a minimum salary. 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.

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, there was no written agreement provided that met the criteria for a direct seller. The worker was engaged to promote, and sell the home care systems for the firm as the distributor of those systems. Undoubtedly, the worker's services were part of the firm's success as a distributor of the home care systems. 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.