

SS-8 Determination—Determination for Public Inspection

Occupation 02SAL Salespersons	Determination: <input checked="" type="checkbox"/> Employee <input type="checkbox"/> Contractor
UILC	Third Party Communication: <input checked="" type="checkbox"/> None <input type="checkbox"/> 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 her work status as an insurance producer in tax year 2018, for which she received Form 1099-MISC. In this position she opened and closed the office, answered the phones, serviced accounts, worked quotes for insurance, accepted payments, binded policies, and answered questions. The firm's business is described as an insurance agency.

The firm's response was signed by the insurance agent and president. The firm's business is described as an insurance broker; he indicated the worker worked alongside him from 1/15/2018 to 8/15/2018, quoting and issuing insurance policies.

The worker stated she was given specific training and instructions by the firm's owner as she had never done insurance before; and, this included training on the computer system to include quoting and binding. The job assignments came from the firm verbally or via emails or texts. The firm determined the methods by which the worker's services were performed. Any problems or complaints encountered by the worker were directed to the firm for resolution. The worker's services were rendered on the firm's premises from 9am to 5pm, with the occasional trip to take pictures of houses or autos that were being insured. The worker was required to perform the services personally; any additional personnel were hired and paid by the firm.

The firm responded the worker was not given training and instructions; she had received her insurance education on her own. The worker's job assignments were as a result of phone calls from customers in need of policies or filing claims. Any problems or complaints encountered by the worker were directed to the Insurance Company for resolution. The firm indicated the worker's services were rendered at the the firm location; she would come in around 8am, then travel around for quotes as customers needed, and sometimes came back and sometimes went straight home. The worker was required to perform the services personally. Any helpers or substitutes needed was considered not applicable; but would be hired and paid by the worker if ever needed.

The worker replied the firm provided everything; and, she furnished nothing and did not incur expenses other than gas if she had to take photos. The worker did not lease equipment, space, or a facility. The worker was paid an hourly wage with a bonus if the goal was met. The customers paid the firm. The worker indicated she was covered under the firm's workers' compensation insurance policy, that she was not at risk for a financial loss in this work relationship, and she did not establish level of payment for services provided or products sold.

According to the firm, the worker was provided an Insurance Company laptop. The worker furnished and incurred the expense for training courses, state exam for the license, and everything associated with insurance sales. The worker did not lease equipment, space, or a facility. The customers paid the Insurance Company; the worker was paid a commission. The customers paid the Insurance Company, which paid the firm, who then paid the worker. The worker was not covered under the firm's workers' compensation insurance policy. The worker did not establish level of payment for services provided or products sold - the Insurance Company did.

Both parties concur there were no benefits extended to the worker; the worker did indicate there were bonuses if goals were met. Either party could terminate the work relationship without incurring a liability or penalty. The firm responded the worker was performing same or similar services for others during the same time frame; the worker disagreed. The worker was a producer and her insurance license was registered with the Insurance Company in that state; she was not allowed to work for any other agency during her employment. The services were rendered under the firm's agency name.

The worker stated they would cross-sell current clients, if possible; but, her main responsibility was to service existing client policies for the firm's agency. She had to complete client reviews for the firm which he signed and sent to the Insurance Company. The worker stated all orders were submitted to and subject to the firm's approval; the firm disagreed. Both parties agree the worker did not sell life insurance full time; the worker added that if the client did not have life insurance the client was passed on for the firm to sell life insurance.

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.

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.

If the services must be rendered personally, presumably the person or persons for whom the services are performed are interested in the methods used to accomplish the work as well as in the results.

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.

Lack of significant investment by a person in facilities or equipment used in performing services for another indicates dependence on the employer and, accordingly, the existence of an employer-employee relationship. 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. Also, if the firm has the right to control the equipment, it is unlikely the worker had an investment in facilities.

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 to 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.