

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 her work status as a brand ambassador in tax year 2018, for which she received Form 1099-MISC. In this capacity she was assigned to a retail establishment to promote and sell the firm's fragrances. The firm's business is described as a wholesale fragrance distributor.

The firm's response was signed by the president. The firm's business is a distributor of perfume; they import and sell to retail stores in the United States. The worker provided services as a freelance fragrance promoter on a part-time basis for a contracted period of time.

The worker stated the firm provided pamphlets and brochures regarding the products. The job assignments came from the regional account executive; and, it was the firm's account executive that determined the methods by which the worker's services were performed. The firm told her what to wear (white blouse, black slacks), where to be (which retail store), and what time to be there and how long to stay; and, that she was not entitled to breaks or lunch. Any problems or complaints encountered by the worker were directed to the firm for resolution. The worker performed her services four to five days per week, generally 5 hours per day. The worker was not required to perform the services personally; and, any additional personnel were hired and paid by the firm.

The firm responded that the worker was hired for her expertise and knowledge of perfume and selling; the firm only provided product information on the brand. There was no job assignments except to demonstrate the perfume during the contract period. The national industry standard was the determining factor as to the methods by which the worker's services were performed. Any problems or complaints encountered by the worker were directed to the firm's regional manager or the department manager at the retail location. The worker was to report on the hours worked weekly and the sales achieved during those hours. The worker's services were rendered at a retail location. She was not required to perform the services personally, she was allowed to find a substitute and hire them, if needed, with the approval of the regional manager. The firm paid the substitute.

The firm and worker acknowledge that the firm provided testers, promotional gift with purchase, samples, and empty atomizers. The worker furnished nothing, she did not incur expenses except for parking, gas, and food, and she did not lease equipment, space, or a facility. The firm paid the worker a fixed hourly amount; the customers paid the retail establishment. The worker was covered under the firm's workers' compensation insurance policy. Both parties concur the worker was not at risk for a financial loss in this work relationship. The worker did not establish level of payment for services provided or products sold, the firm did.

There were no benefits extended to the worker. Either party could terminate the work relationship without incurring a liability or penalty. The firm and worker agree she was performing same or similar services for others during the same time frame. the firm noting that the services are part-time and for limited engagements; it is expected that the worker's achieve full-time by working for multiple firms. The worker stated she was required to obtain the firm's permission to work for others; the firm disagreed. The worker stated she was fired.

The firm responded that the worker had no responsibility to solicit new customers; her job was to demonstrate perfume to customers that pass by counter. The firm determined the worker's territory.

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.

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.

The fact that the person or persons for whom the services are performed furnish significant tools, materials, and other equipment tends to show the existence of an employer-employee relationship.

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.

The firm's statement that the worker was an independent contractor 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.

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.