

**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 as a sales representative in 2018, for which he received Form 1099-MISC. The firm's response was signed by the president. The firm and worker indicated the worker obtained the job through an application process. The firm's business is described as the manufacturing of custom aluminum-clad wood windows and doors.

The worker stated he was given specific training and instructions as to schematics of the product and how to interpret blue prints and was told specifically what to say to potential clients on sales calls. The job assignments came from the owner's son who followed up and reviewed the work and emails. 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 rendered his services Monday through Friday from 9:30am to 4pm, with 80% of his time spent on the firm's premises and the remainder at job sites. The worker was required to perform the services personally; any additional personnel could be hired with the firm's approval and the worker would not be reimbursed for any payments.

The firm responded that the worker was educated regarding the quality and features of the firm's windows and doors. The worker's job assignment was to contact prospective customers from generated leads. The sales representative 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 had control over his schedule except for trainings and meetings. The worker's services were rendered at the firm's premises, customer location, or home. The worker was required to perform the services personally. The firm's approval was required if the worker hired substitutes or helpers; the sales representative was responsible for paying the helper and was not reimbursed.

The worker stated the firm provided computer, email, business cards, office space and office supplies. The firm acknowledged that the worker was provided with sales brochures and window products; and, both parties agreed the worker furnished his vehicle and incurred related expenses. The worker did not lease equipment, space, or a facility. The worker indicated he was paid a salary and guaranteed \$XXX/week. The firm responded the worker was paid a commission; and was guaranteed \$YY,YYY with weekly draws available. The customers paid the firm. The worker was not at risk for a financial loss in this work relationship other than possible damage to his personal vehicle. The firm established the level of payment for services provided and/or products sold.

The worker stated he was entitled benefits of paid vacations and paid holidays; the firm indicated there were no benefits extended to the worker. Either party could terminate the work relationship without incurring a liability or penalty. Both parties agree the worker was not performing same or similar services for others during the same time frame; the firm stated the worker would be required to obtain the firm's approval. The worker was a sales representative under the name of the firm.

The worker indicated call leads were provided by the firm; he obtained blueprints from prospective customers, emailed estimates, demonstrated the products, and followed up with clients, and the monies due. The firm provided the prospective leads. All terms, conditions, and orders were subject to the firm's approval. He sold the products from the firm's main office; the merchandise sold was not for resale.

The firm stated the worker was responsible for soliciting customers that were building custom homes or remodeling existing homes. The firm provided prospective leads initially until the sales representative became established. The worker kept a log of solicited leads and outcome. The terms and conditions established for a sale was 50% down with the balance COD. All orders were subject to the firm's approval. The worker's territory was determined by the sales manager. The worker's services were rendered at the firm's showroom, or at the office or home of prospective customers. The worker sold only aluminum-clad windows and doors used in the construction of homes and commercial buildings.

The firm provided a copy of the contract dated 7/9/2018 which contained the following: • the worker would represent the company as its sales representative in a specific geographical location as determined by the firm and subject to change, except for any sales or accounts the firm deems necessary to handle itself; • the worker is to be an IC; • worker agrees to provide sales reports and attend firm's sales meetings; • compensation is commissions, and subject to change at any time by the firm; • non-compete clause for a period of one year within 50-mile radius.

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## Analysis

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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.

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 pursuant to an 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.

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.