

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 January 2017 to December 2017 as a financial advisor. The services performed included generating sales via seeking out new clients, pursuing leads, establishing an Internet presence, and hosting client seminars. The firm issued the worker Form W-2 for 2017. The worker filed Form SS-8 as he believes he should have been classified as a statutory employee.

The firm's response states its business is financial services including estate, retirement, life insurance, annuities, and tax planning for individuals. The worker was engaged as a financial advisor who met with individuals to discuss retirement planning and provide financial services for clients to meet their goals through insurance products. The worker was classified as a common law employee for tax years 2015, 2016, and 2017 based on the firm giving him direction and leadership, paying him salary, and setting his schedule. In 2018, the worker became an independent advisor performing services under an established business name and employer identification number (EIN). At that time, the worker set his own schedule and was paid on a jointly agreed percentage.

The firm stated that prior to 2018, it trained the worker on product and customer service requirements. Work assignments were directed by the firm. If problems or complaints arose, the firm was contacted and assumed responsibility for problem resolution. The firm set the worker's work schedule. Services were performed at various presentation sites such as restaurants, customer locations, and office space. The firm required the worker to attend weekly meetings for case management discussion purposes. The firm required the worker to personally perform services. Substitutes or helpers were not applicable. The worker stated the firm did not provide him specific training or instruction. It only provided a general overview of the company. Work assignments consisted of him agreeing to host client seminars arranged by the firm. The method by which assignments were performed was negotiated between he and the firm. Reports included database entries related to the status of client engagements resulting from seminar solicitations. His routine consisted of generating client contacts, meeting with clients at their convenience, and finalizing sales. There were no scheduled work hours. Hosting client seminars typically occurred once per week.

The firm stated that prior to 2018, it provided and incurred the expense associated with marketing, office, desktop computer, and office equipment. The worker provided his cell phone and laptop computer. The worker incurred the expense of mileage and licensing, which the firm reimbursed to the worker. The firm paid the worker salary. Customers pay the insurance company directly. The worker did not incur economic loss or financial risk. The general agent determined the level of payment for the services provided or the products sold. The worker stated the firm also provided secretarial/administrative assistance. He also provided his automobile, home office, printer, and other electronic devices. He did not lease equipment, space, or a facility. He incurred the expense associated with travel and entertainment, automobile, hosting client events, and home office expenses. The firm fronted the initial cost of a seminar and recaptured its costs from his commission. He was not allowed a drawing account for advances. His economic loss or financial risk related to possible damage to his home office equipment and business automobile.

The firm stated that prior to 2018, it provided the worker the benefit of paid time off (PTO) and discounted health benefits. The work relationship could be terminated by either party without incurring liability or penalty. It is unknown if the worker advertised. The firm represented the worker as an employee/advisor to its customers. The work relationship ended when the worker no longer provided services on behalf of the firm. The worker stated benefits were not provided. He did not perform similar services for others during the period in question. Services were performed under a confidentiality and non-solicitation agreement signed in July 2016. The agreement states, in part, it contains post-termination restrictive covenants on confidentiality, non-solicitation, and non-competition. The purpose of the agreement was to protect the legitimate business interests of the employer (firm) and to prevent an unfair competitive advantage to another company or individual. The firm required the worker to sign the agreement as a condition of employment, in order to protect its legitimate business interests and to prevent unfair post-termination competition. The firm was seeking to protect, in part, its substantial labor, time, and investment necessary to hire and train employees in the investment advisory and annuities business. The worker agreed that all business and confidential information was the exclusive property of the firm, whether created by the firm or the worker. All insurance records were to be retained only by the firm following separation. The rights and obligations set forth in the agreement could only be assigned by the firm. The work relationship ended in 2018 when he resigned.

The firm stated the worker's responsibilities in soliciting new customers included presentation seminars to build his client base. They jointly provided leads to prospective customers and determined the worker's territory. The firm's terms and conditions of sale included licenses and E&O insurance. The worker sold life insurance full-time, in addition to other types of insurance for the firm. The worker stated he tailored his own presen

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.

For federal employment tax purposes, it is the actual working relationship that is controlling and not the terms of a 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.

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. In this case, the firm required the worker to personally perform services. Furthermore, the services performed by the worker were integral to the firm's business operation. The firm provided work assignments by virtue of the clients served, required the worker to report on client engagement results, and 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.

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. 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. Based on the salary or commission 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. The written agreement documents the intent of the parties to establish an employer-employee relationship. 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 in question. 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 for the 2017 tax year, and not an independent contractor meeting the criteria of statutory employee. As documentation evidences the firm paid the worker's business entity for the 2018 tax year, it cannot be considered for SS-8 determination purposes.