

**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 May 2016 to January 2019 as an energy engineer. Services performed were technical sales which included following up on leads provided by the firm, introducing the firm and its solar benefits to customers, following the firm's sales script, calling the firm's hub to close sales, and having the customer sign the firm's contract and finance documents. The firm issued the worker Form 1099-MISC for 2016 through 2018. A copy of the 2019 tax reporting document was not provided for our review. The worker filed Form SS-8 as he believes he incorrectly received Form 1099-MISC.

The firm's response states it is a general contracting business which provides sale and installation of residential solar solutions and other energy efficient home improvements. The worker was engaged as an independent outside sales contractor. The firm believes the worker was an independent contractor as he had operated in the industry prior, chose to perform sales, controlled his own schedule, did not report hours, was only paid commission for sales, did not supervise personnel, was not performing any other services for the firm, and did not receive employee benefits. Services were performed under a provisional offer and independent contractor agreement for salespersons.

The firm stated it offered the worker optional sales seminars and general information on procedures; however, he was not required to attend. Work assignments consisted of leads provided by the firm to the worker; he decided what to pursue. The worker determined the methods by which assignments were performed. The worker was responsible for his own performance of duties; however, the firm's sales support personnel were available to contribute to solutions. Reports were not required; however, the worker was responsible for advising the firm's sales support personnel on the dispositions of leads allocated to him. Meetings were not required. The worker's daily routine was unknown to the firm. Services were performed at potential customers' homes. The firm required the worker to personally perform services. If the worker hired substitutes or helpers, notice had to be provided to the firm. The worker stated the firm provided specific training and work assignments. The firm determined the methods by which assignments were performed and assumed responsibility for problem resolution. Reports included acknowledging lead receipts and calling the firm to close the sale. He performed services on a regular, recurring basis and had to report to the firm weekly if taking time off. He spent time at customers' homes, traveling to leads, the firm's office and his home doing reports. Meetings included manager meetings (once elevated to VIP status), weekly sales meetings, and daily training. Copies of meeting invites were provided for our review. Hiring substitutes or helpers was not applicable.

The firm stated it provided a number of vetted leads to pursue for sales. The worker provided all other materials. The worker did not lease equipment, space, or a facility. The worker incurred the unreimbursed expense associated with gas and mileage. Customers paid the firm. The firm paid the worker commission. The firm carried workers' compensation insurance on the worker. The worker did not incur economic loss or financial risk. The firm's executive management established the level of payment for the services provided. The worker stated the firm provided contracts, training materials, call center support, in-office computers, and advertising. The firm also paid him a fixed monthly VIP rate of pay.

The firm stated there were no benefits made available to the worker. The work relationship could be terminated by either party without incurring liability or penalty. The worker performed similar services for others during the period in question; he was not required to get approval from the firm. The worker was prohibited from using the firm's proprietary information or leads to render services to other companies. It is unknown if the worker advertised. The firm represented the worker as an independent sales contractor to its customers. Services were performed in the name of the firm. The work relationship ended when the worker terminated the relationship. The worker stated the benefit of personal days, bonuses, and paid trips for sale goals were made available. If goals were met, different commission levels were offered. He did not perform similar services for others. The firm prohibited him from taking employment with any organization or business which was competitive with the firm's business. He did not advertise as the firm had call centers for leads. The firm represented him as a sales representative, project manager, energy engineer, commercial project manager, quality control or site inspector to its customers, i.e. anything to get into the customer's home.

Services were performed under a provisional offer agreement and independent contractor agreement for salespersons, dated April 6, 2018. The provisional offer agreement states, in part, that all decisions relating to the job were to be made exclusively by the firm's management team. All work performed and accomplished on premises or off-site for the firm was owned solely by the firm. The worker would devote as many hours per week as necessary to complete allocated tasks and meet professional responsibilities. The worker agreed to return all computers, equipment, vehicles, money, credit or debit cards, documents, files, and any other materials provided by the firm on his final day of work. The worker agreed to seek pre-approval on expenses and supplies in advance of expenditures from his supervising manager or executive management.

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## 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.

Therefore, the firm's statement that a worker is an independent contractor pursuant to a written 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. 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's management team ultimately controlled the methods by which assignments were performed, it required the worker to report on services performed, and ultimately 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. As acknowledged by the firm, the worker did not incur economic loss or financial risk. Based on the 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. Both parties retained the right to terminate the work relationship at any time without incurring a liability. 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 of this work relationship. The classification of a worker as an independent contractor should not be based primarily on the fact that a worker's services may be used on a temporary, part-time, or as-needed basis. 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, and not an independent contractor operating a trade or business.

The firm can obtain additional information related to worker classification online at [www.irs.gov](http://www.irs.gov); Publication 4341.