

SS-8 Determination—Determination for Public Inspection

Occupation

Business/Computer Services/Office/Sales

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 determination in connection with services performed for the firm from 2018-2023 as a vice president of sales. Services performed included managing employees, sales, project management, delivery and installation, customer services, and the firm's showroom. The worker filed Form SS-8 as they believe they received Form 1099-NEC in error. The worker believes they were an employee of the firm as they were required to perform services for a minimum of three days, was required to use the firm's customer service personnel. The worker was not able to determine their own schedule.

The firm's response states its business sells office furniture. The worker was engaged as a commission salesperson. The worker was classified as an independent contractor as the worker worked independently on a commission basis. The worker had the freedom to schedule vacations when they wanted. The worker performed similar services for others. The worker incurred the cost of memberships, hired their own people, and decided what clients to sell too. The worker signed a commission agreement as an independent contractor.

The firm stated there was no training or instructions provided for the worker. The worker generated their own work assignments based on leads. The worker determined the methods by which those assignments were performed. If problems or complaints arose, the worker was contacted as well as responsible for resolution. The firm did not require the worker to submit any reports or attend any meetings. The worker had the freedom to choose where services were performed. The worker determined their own schedule. The firm did not require the worker to personally perform services. The worker could hire substitutes or helpers; approval was not required by the firm. The worker was responsible for paying any substitutes or helpers hired and was not reimbursed by the firm. The worker stated the firm provided training on how to use the firm's POS system and was required to use their CRM. The worker received work assignments in person, email, phone, or via text message. The firm determined the methods by which those assignments were performed. If problems or complaints arose, the firm was contacted. The worker was responsible for resolution. The firm required the worker to complete reports. The firm required the worker to attend staff and sales meetings. Services were performed on the firm's premises on a regularly scheduled basis. The firm required the worker to personally perform services. The worker could hire substitutes or helpers; approval from the firm was required.

The firm stated they did not provide any supplies, materials, or equipment to the worker. The worker could use the firm's printer when in the firm's showroom. The worker supplied their own supplies that were needed to perform services. The firm was unsure if the worker leased space, equipment, or a facility. The worker did incur job-related expenses in the performance of the services for the firm. The worker was responsible for paying memberships, home office, phones, gas, vehicle, and insurance. The firm did not reimburse the worker for any job-related expenses. Clients paid the firm. The worker was paid a commission rate of pay. The worker did take a financial risk and could suffer a financial loss performing services. The worker set the rate of pay for the services provided and products sold. The firm did not carry workers' compensation insurance on the worker. The worker stated the firm provided the worker with office supplies and a credit card. The worker did not lease space, equipment, or a facility. The worker incurred the job-related expenses of postage, lunches with clients, marketings, and food for events. The worker did not take a financial risk and could not suffer a financial loss performing services.

The firm states there were no benefits made available to the worker. Either party could end the work relationship without penalty. The worker performed similar services for others during the term of the work relationship. There was an agreement prohibiting competition which was in effect after the worker was terminated. Services were performed under the firm's business name. The work relationship ended when the firm terminated the worker for poor performance. The worker stated they did not perform similar services for others. There was a non-compete agreement between the parties. The firm ended the work relationship.

The written agreement, in part states, salesperson shall perform duties for the firm as a salesperson selling office furniture. Salesperson shall use his or her best efforts to sell and develop business opportunities for the firm and to maintain the good reputation of the firm in the office furniture field. The firm will provide reasonable assistance to Salesperson for these efforts. All sales and agreements with customers are subject to approval by the firm. The firm in its sole discretion may decline to enter into or approve any customer contract or sale. Salesperson shall have no authority to enter into binding agreements for or on behalf of the firm except as specifically authorized by the firm with respect to the sale of office furniture.

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, a statement that a worker is an independent contractor pursuant to a written or verbal 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.

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 firm provided work assignments by virtue of client served 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 their right to direct and control the worker; however, the facts evidence the firm retained the right to do so if needed.

Factors that illustrate whether there is a right to control how a worker performs a task include training and instructions. The need to direct and control a worker and their services should not be confused with the right to direct and control. The worker provided their services on behalf of and under the firm's business name rather than an entity of their own. The firm was responsible for the quality of the work performed by the worker and for the satisfaction of their clients. This gave the firm the right to direct and control the worker and their services in order to protect their financial investment, their business reputation, and their relationship with their clients.

While the firm stated they provided the worker with freedom of action as to when they performed services, this in and of itself does not determine the worker's status as an independent contractor. The whole relationship needed to be analyzed to determine the worker's correct employment tax status. An important factor of determining a worker's status is who had the contractual relationship with the customer and whom did the customer pay. In this case, that relationship was between the firm and their customers.

The firm provided information that the worker operated under their own entity. It should be noted that it is possible for a person to work for a number of people or firms concurrently due to financial need and the supporting oneself and be an employee of one or all of whom engages them.

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. 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 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. Both parties retained the right to terminate the work relationship at any time without penalty. 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; Publication 4341.