

Department of the Treasury
Internal Revenue Service

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 2023-2025 as a sales agent. Services performed included writing policies for new and previously canceled customers. The worker was initially hired as a customer service representative in 2022 and was then transitioned to a sales agent in 2023. The worker was issued a Form W2 for services performed as a customer services representative. The worker filed Form SS8 as they believe they received Form 1099-NEC for the services performed as a sales agent. The worker believes they were an employee as the services performed were the same as when the worker was issued a Form W2.

The firm's response states its business is an insurance agency. The firm sells health and Medicare products. The worker was engaged as an insurance sales agent. Services performed included calling customers or leads and selling health or Medicare insurance policies. The worker was classified as an independent contractor as the worker conducted all sales on their own. The worker performed services remotely. The worker was initially hired as an employee and then transitioned to a sales agent and classified as an independent contractor. The worker completed new paperwork in 2023 to be classified as an independent contractor. The firm provided the worker's signed Form W-9, Request for Taxpayer Identification Number and Certification, which documented their Social Security Number. The firm also provided a copy of an independent contractor's termination agreement.

The firm states they did not provide any training or instructions for the worker. The worker received training from the insurance companies that the worker contracted with. These companies would require testing before enabling the worker to sell. The firm did not provide work assignments. The worker provided their own work assignments and 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 complete any reports or attend any meetings. Services were performed remotely based on the worker's schedule and time. The firm required the worker to personally perform services. The worker could hire substitutes or helpers; approval from the firm was not required. The worker was not responsible for paying substitutes or helpers. The worker states the firm assisted the worker in getting their licenses with the various carries for whom the worker sold insurance policies for. The firm provided work assignments and determined the methods by which those assignments were performed. The firm was responsible for problem resolution. The worker was required to complete reports and attend sales and staff meetings. Services were performed on a regularly scheduled basis based on the block of time that was assigned to the worker. The firm was responsible for the hiring and paying of substitutes or helpers.

The firm states that the providing of equipment, supplies or materials was not applicable. The worker did not lease space, equipment, or a facility. The worker did not incur any job-related expenses in performing services for the firm. Customer paid the worker. Payment made to the worker was not provided to the firm. The worker was paid a commission rate of pay. The worker could not request advance pay. The worker did take a financial risk and could suffer a financial loss performing services. The insurance carries 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 states the firm provided a computer, monitors, phone, and the sales software that was needed to manage leads and interact with insurance carries, and customers. The worker incurred the expense of licensing fees. Customers paid the firm. The worker did not take a financial risk and could not suffer a financial loss performing services. The firm set the rate of pay for the services provided. The insurance carries set the rate for the products sold.

The firm states there were no benefits made available to the worker. Either party could end the work relationship without penalty. The worker did not perform similar services for others during the term of the work relationship. There was an agreement prohibiting competition between the parties. Services were performed under the worker's name. The work relationship between the parties has ended. The worker stated the firm provided them with the benefits of paid holidays, paid vacations, sick pay, bonuses, etc. Services were performed under the firm's business name. The worker ended the work relationship.

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, co-adventurer, 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.

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 as an insurance agency. 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.

Payment by the hour, day, 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. 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 stated by the firm, the worker did not have any job-related expenses. Based on the commission 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 as an insurance agency. 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; Publication 4341.