

SS-8 Determination—Determination for Public Inspection

Occupation

RET - Retail Workers

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 in 2025 as a sales associate. Services performed included taking incoming sales leads, traveling to potential clients' homes, and consulting with clients on window covering needs. The worker filed Form SS08 as they believe they received Form 1099-NEC in error. The worker believes they were an employee as they were required to perform services on the firm's premises during the firm's business hours. The worker was required to use the firm's business phone for client engagement and communication.

The firm's response states its business provides assembly and installation on custom window treatments. The worker was engaged as a salesperson. Services performed included generating sales for the firm's business. The worker was classified as an independent contractor as the worker set their own hours and generated their own leads. The worker has the freedom to perform services where and how they wanted to. The firm stated the worker operated under an LLC that the worker formed in 2025.

The firm states they provided the worker with knowledge of the firm's software. The firm did not provide any training on how to sell or measure. The worker received work assignments by generating their own leads. The worker determined the methods by which those assignments were performed. If problems or complaints arose, the firm was contacted. Both parties were responsible for resolution. The firm did not require the worker to complete any reports or attend any meetings. Services were performed on the firm's premises, worker's office/shop, and on the firm's client's premises on an as-needed basis. The firm did not require the worker to personally perform services. The worker could hire substitutes or helpers; approval from the firm was required. The worker was not responsible for paying substitutes or helpers. The worker states they received training and instructions from the firm. The worker shadowed the owner of the firm for a two-month period and received guidebooks to study. The worker did not have any previous experience in this line of work. The firm provided work assignments and determined the methods by which those assignments were performed. The firm was responsible for problem resolution. Services were performed on a regularly scheduled basis on both the firm's and the firm's customers' premises. The worker was required to attend staff meetings. The worker was required to personally perform services. The firm was responsible for the hiring and paying of substitutes or helpers.

The firm states they provided the worker with fabric samples. The worker provided transportation, tools, computer, and measuring devices. The worker did not lease space, equipment, or a facility. The worker incurred the job-related expense of fuel, phones, and lead generation. Clients paid the firm. The worker was paid an hourly and commission rate of pay. The worker took a financial risk performing services based on if the worker had no sales results this would have ended the work relationship. The worker could suffer a financial loss performing services for the firm if a measurement was incorrect, it would not have been paid by the firm fully as a completed sale. Both parties set the rate for the services provided. The firm set the rate of pay for products sold. The firm did carry workers' compensation insurance on the worker. The worker states the firm provided a measuring tape, fabric swatches, and fabric books. The worker incurred the job-related expenses of mileage, travel, and meals when traveling. The worker did take a financial risk and could suffer a financial loss because if any errors were made that would cost the firm, this would result in the worker not being paid. These errors would be deducted from the worker's commission pay. The firm set the rate of pay for the services provided and 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 performed similar services for others during the term of the work relationship. The worker did not advertise their services. There were no agreements prohibiting competition. Services were performed under the firm's business name. The firm states the work relationship ended when the firm no longer needed the worker's services. The worker states the work relationship could not end without penalty because if the work relationship ended, the worker would forfeit any unpaid commission. There was an agreement between the parties prohibiting competition. The worker did not perform similar services for others. The firm 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, coadventurer, agent, or independent contractor must be disregarded.

Therefore, the firm's statement that the worker was an independent contractor pursuant to an oral 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 clients' services 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.

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 customers. 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 customers.

The firm provided information that the worker operated under their own business. 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.

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 client and whom did the client pay. In this case, that relationship was between the firm and their clients.

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 hourly and 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 penalty. There is no evidence to suggest the worker performed similar services for others as an independent contractor. 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.