

SS-8 Determination—Determination for Public Inspection

Occupation

04MAN Sales Manager

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 initiated the request for a determination of his work status as a sales manager in tax year 2017. In this position he solicited sales by phone and email, packaged product for shipment, palletted for shipping, performed cleaning, etc. The firm's business is described as a manufacturer of residential personal repellents and insecticides sold to retail and online customers.

The firm's response was signed by the president. The firm's business is described as a manufacturer and marketer of insect repellent and insecticide. The worker provided services as a sales manager.

The worker indicated he was given specific training and instructions on soliciting customers via email, packaging product, and palletting and shrink-wrap procedures. The job assignments were disseminated from the firm's owner and the operations manager. The firm determined the methods by which the worker's services were performed. Any problems or complaints encountered by the worker were directed to the firm for resolution. The worker responded that his services were rendered on the firm's premises during an 8-hour day. The worker was required to perform the services personally; and, any additional personnel were hired and paid by the firm.

The firm's response was that training and instructions were consistent with customer requests or procedures. The job assignments were given verbally; and, it was the worker who determined the methods by which he performed the job tasks. The firm's owner was contacted and was responsible for the resolution of any problems or complaints. The worker's routine consisted of responding to customer requests, placing sales calls, meeting with potential clients, attending trade shows, and setting up sales plans; the worker was encouraged to perform his job during standard business hours/client availability. The worker's services were rendered from the firm's offices, on the road, and from the worker's home. The worker was required to perform the services personally.

The firm and worker concurred that the firm provided an iPad, desktop network computer, landline telephone; the firm added that the worker provided his cellphone and a vehicle. The worker did not lease equipment, space, or a facility. The firm responded the worker was paid a commission; however, information submitted indicates the worker was paid a salary which was paid out on a weekly basis. The customers paid the firm. The firm confirmed the worker was not covered under the firm's workers' compensation insurance policy. Both parties responded that the worker was not at risk for a financial loss in this work relationship and that he did not establish price lists/level of payment for services provided or products sold.

Both parties acknowledged that there were no benefits extended to the worker; although the worker noted that he could be given a personal day at the owner's discretion. Either party could terminate the work relationship without incurring a liability or penalty. The worker was not performing same or similar services for others during the same time frame. They agreed the firm terminated the work relationship.

The firm and worker agreed the worker was responsible for email campaigns, cold calling, networking, and following through on leads from the firm as to prospective customers, and providing reports to the firm. The firm's products were sold over the phone, in person, and through trade show venues; all orders were submitted to and subject to the firm's approval. It should be noted there was no written contract submitted by either party.

Analysis

A worker who is required to comply with another person's instructions about when, where, and how he or she is to work is ordinarily an employee. This control factor is present if the person or persons for whom the services are performed have the right to require compliance with instructions. Some employees may work without receiving instructions because they are highly proficient and conscientious workers or because the duties are so simple or familiar to them. Furthermore, the instructions, that show how to reach the desired results, may have been oral and given only once at the beginning of the relationship.

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.

If the work is performed on the premises of the person or persons for whom the services are performed, that factor suggests control over the worker, especially if the work could be done elsewhere. Work done off the premises of the person or persons receiving the services, such as at the office of the worker, indicates some freedom from control. However, this fact by itself does not mean that the worker is not an employee. The importance of this factor depends on the nature of the service involved and the extent to which an employer generally would require that employees perform such services on the employer's premises. Control over the place of work is indicated when the person or persons for whom the services are performed have the right to compel the worker to travel a designated route, to canvass a territory within a certain time, or to work at specific places as required.

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.

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.

We have considered the information provided by both parties to this work relationship. In this case, the firm retained the right to change the worker's methods and to direct the worker to the extent necessary to protect its financial investment and business reputation and to ensure its customers' satisfaction and that its contractual obligations were met. The worker was not operating a separate and distinct business; the worker did not invest capital or assume business risks, and therefore, did not have the opportunity to realize a profit or incur a loss as a result of the services provided. 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 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.

CONCLUSION

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.