

## SS-8 Determination—Determination for Public Inspection

Occupation

05PRW Public Relations 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 firm is in the business of repairing consumer electronics and providing computer consulting services. The worker was engaged by the firm as a Customer Service Representative to answer phones, meet the customers, and related tasks, as well as performing repairs. The firm reported the worker's remuneration on Forms 1099-MISC in 2017 and 2018.

The firm submitted its job offer to the worker stating, among other things, his work schedule, hourly rate of pay, and responsibilities; the worker will be treated as an independent contractor; the worker works "at-will"; the worker is to sign the non-compete agreement; and the worker will be given an "employee handbook" describing the firm's policies and procedures, then sign and return the acknowledgment of receipt to the firm.

Information from the parties supports that the firm trained the worker. It provides the worker with his work assignments and the methods by which to perform them. If problems or complaints occur, the worker contacts the firm for resolution. The worker is required to submit phone call logs daily. He attends staff meetings. If additional personnel are needed, the firm is responsible for hiring and compensating them. The worker does not advertise his services or provide similar services for others.

The firm provides the phone, internet service, space, parts, and the property. The worker does not incur expenses in the performance of his services. The firm does not cover the worker under workers' compensation. Customers pay the firm directly at prices established by the firm. Neither party indicated an investment by the worker in the firm or a related business, or the risk of the worker incurring a financial loss beyond the normal loss of compensation.

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## Analysis

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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.

Factors that illustrate whether there is a right to control how a worker performs a task include training and instructions. In this case, the firm trained the worker. It is responsible for resolving any problems or complaints that may occur. The firm retains the right to change the worker's methods and to direct the worker to the extent necessary to protect its financial investment. The worker follows the schedule set by the firm. He performs his services on the firm's premises. 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. The worker is required to perform his services personally, meaning he cannot engage and pay others to perform services for the firm on his behalf. 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. These facts show that the firm retains behavioral control over the services of the worker.

Factors that illustrate whether there is a right to direct and control the financial aspects of the worker's activities include significant investment, unreimbursed expenses, the methods of payment, and the opportunity for profit or loss. In this case, the worker did not invest capital or assume business risks, and therefore, does not have the opportunity to realize a profit or incur a loss as a result of the services provided. "Profit or loss" implies the use of capital by a person in an independent business of his or her own. Lack of significant investment by a person in facilities or equipment used in performing services for another indicates dependence on the employer and, accordingly, the existence of an employer-employee relationship. The firm pays the worker at an hourly rate. Payment by the hour generally points to an employer-employee relationship. These facts show that the firm retains control over the financial aspects of the worker's services.

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 is not engaged in an independent enterprise, but rather the services performed by the worker as Customer Service Representative and other tasks are a necessary and integral part of the firm's consumer electronic repair business. 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. These facts show that the firm retains control over the work relationship and services of the worker.

Based on the above analysis, we conclude that the firm has the right to exercise direction and control over the worker to the degree necessary to establish that the worker is a common law employee, and not an independent contractor operating a trade or business.