

**SS-8 Determination—Determination for Public Inspection**

Occupation

09DVC Delivery Driver

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 delivering food. The worker was a delivery driver and salesperson who provided home delivery as well as solicited new customers. He received a Form 1099-MISC for 2011, 2012, 2013 and 2014 for his services. There was no written agreement.

Both the firm and the worker indicated that a co-worker provided on-the-job training. The worker noted that he was taught how to do the paperwork, and how to package/deliver food. The firm added that the other driver showed the worker how to build routes. According to the worker, each month the firm would provide the worker with a list of who paid, or canceled their card and would keep him informed of processed payments. Each party indicated that the other determined the methods by which the assignments were performed and would be contacted if any issues or problems arose. The worker would fill-out food stamp vouchers, turn them into the firm and provide the firm with a database to edit as well. The firm noted that the worker reported proof of sales. The worker had a monthly delivery routine which included reporting to the warehouse, hooking-up and loading the firm's trailer. The firm would give him a route, and a list of people who could/could not buy. Sometimes the firm's owner and others would accompany him. The firm simply stated that the worker determined his own schedule, loaded the truck at the supplier and delivered along a route. There were monthly meetings to go over accounts and sign a pay sheet. There was disagreement over whether the firm or worker would hire and pay others.

Both the firm and the worker agreed that the firm provided the delivery trailer; the worker included that the firm also provided the warehouse, freezers, food, soda, and vouchers. The worker provided the vehicle, truck, advertisements, misc. supplies, gas, lodging, and meals; he was not reimbursed by the firm. The worker was paid a commission with no guaranteed minimum and was allowed advances when needed. The worker described his pay as commission and that the firm would help with his bills if he didn't make enough in sales. The firm gave him a personal credit card to use each month and personal items would be deducted from his pay. Both agreed that the commission arrangement was a set fee paid per delivery. Both agreed that the customer paid the firm. The worker could incur an economic loss of his vehicle, or inventory. The worker agreed that some food had spoiled, was charged but then was paid back as it was not his fault. Both parties agreed that the firm established the level of payment for services.

Both the firm and the worker agreed that there were no benefits. Either party could terminate the relationship without incurring a liability. The worker did not perform similar services for others. The worker was to canvas an area and make sales. The worker passed out flyers to potential customers, explained the product, and if interested, they called the firm who would confirm if they were eligible. The worker noted that he gave out vouchers with the firm's phone numbers. The worker sold frozen food, door-to-door to residents. The relationship has ended.

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## Analysis

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In determining whether an individual is an employee or an independent contractor under the common law, all evidence of both control and lack of control or independence must be considered. The relationship of the worker and the business must be examined. Facts that show a right to direct or control how the worker performs the specific tasks for which he or she is hired, who controls the financial aspects of the worker's activities, and how the parties perceive their relationship should be considered. As is the case in almost all worker classification cases, some facts point to an employment relationship while other facts indicate independent contractor status. The determination of the worker's status, then, rests on the weight given to the factors, keeping in mind that no one factor rules. The degree of importance of each factor varies depending on the occupation and the circumstances.

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 retained the right to change the worker's methods and to direct the worker to the extent necessary to protect its financial investment. The firm engaged the worker to deliver the food that it sold to a specific type of clientele. Even if just initially, the worker received instructions and procedures regarding the paperwork needed and customer requirements. It was the firm that approved each customer based on their eligibility. The worker had to report to the firm regarding product sold, and to whom. A requirement that the worker submit regular or written reports to the person or persons for whom the services are performed indicates a degree of control. While the worker had no set scheduled hours, if the nature of the occupation makes fixed hours impractical, a requirement that workers be on the job at certain times is an element of control. It is reasonable that this would be the case as there would have been a delivery schedule for the customers who placed orders for food. In addition, the worker's services were continuous throughout the years involved. A continuing relationship between the worker and the person or persons for whom the services are performed indicates that an employer-employee relationship exists. A continuing relationship may exist where work is performed in frequently recurring although irregular intervals.

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, did not have the opportunity to realize a profit or incur a loss as a result of the services provided. The firm had the investment in the facility, trailer, freezers, and product. The worker did provide his personal vehicle which most workers, either employees or self-employed, possess. 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 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. The firm established the product price, and was paid by the customer. The worker received a set fee per delivery, was advanced money when needed and did not pay for the territory he serviced.

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. There were no employee-type benefits and there was no written agreement. While a signed, written agreement alone would not be determinative of any work relationship, it would have shown the intent of the parties. The worker was engaged to deliver food for the firm's food delivery business. When doing so, the worker was not engaged in an separate business venture. 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.

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.

Please see Publication 4341 for guidance and instructions for firm compliance.