Form **14430-A** (July 2013)

Department of the Treasury - Internal Revenue Service

SS-8 Determination—Determination for Public Inspection

Occupation	Determination:
02SAL Salesperson	☒ 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 provides insurance premium financing services. According to the business card provided by the worker, the worker was engaged by the firm as a regional sales manager. The firm reported the worker's remuneration on Forms 1099-MISC for 2016, 2017, and 2018.

The worker also submitted copies of his Visa business card and related Visa card expense reports, and call activity reports.

Information from the parties supports that the firm instructed the worker on its processes. The worker was responsible for finding new clients. He had control over how he performed his services. The worker was responsible for resolving any problems or complaints for any new business he generated. The worker determined his schedule. He performed his services from his home and on the road visiting insurance agents. The firm stated that the worker was not required to perform his services personally.

The worker utilized his personal automobile. The worker incurred automobile expenses, office expenses, and telephone expenses. The firm paid the worker on a commission basis with a $50,000 guaranteed minimum amount per calendar year. It did not cover the worker under workers’ compensation. Customers paid the firm directly. Neither party indicated an investment in the firm by the worker or the risk of the worker incurring an economic loss or financial risk while performing services for the firm.

The firm provided the worker with insurance benefits. Both parties retained the right to terminate the work relationship without incurring liability or penalty. The firm did not prohibit the worker from providing similar services for others during the same time period. The worker advertised for the firm through telephone calls and personal visits to clients.

The worker was responsible for soliciting new customers by contacting new clients, and presenting and explaining the firm’s services. The worker provided his own leads to prospective customers and determined his own territory. The worker sold the product from home by telephone and by visiting customers at their places of business. Orders were submitted to and subject to approval by the firm.

Analysis

Workers in certain occupations will not be treated as employees for FICA, FUTA, or federal income tax withholding purposes provided they meet certain qualifications. These workers are referred to as "statutory non-employees." IRC 3508(b)(2) provides that, for all IRC purposes, direct sellers are statutory non-employees if the following qualifications are met:

a. The worker is engaged in the sale of consumer products in the home or in other than a permanent retail establishment; engaged in delivering or distribution of newspapers; or engaged in sale of consumer products for resale in the home or in other than a permanent retail establishment.
b. Substantially all of such worker's remuneration for services is directly related to sales or other output rather than to the number of hours worked.
c. A written contract exists between the worker and the taxpayer for which services are being performed that provides that the worker will not be treated as an employee for federal tax purposes.

It appears that the worker does not qualify under 3508. Neither party provided proof of a written contract between the parties. Additionally, in this case, substantially all of the worker's remuneration for services is not directly related to sales or other output.

Factors that illustrate whether there was a right to control how a worker performed 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 worker was required to submit Visa card expense reports and call activity reports. 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 was responsible for problem resolution on new business he generated, orders were submitted to and subject to approval by the firm. The worker performed his services from his home and on the road visiting insurance agents. Work done off the premises of the person or persons receiving the services indicates some freedom from control; however, this fact by itself does not mean that the worker is not an employee. These facts show that the firm retained behavioral control over the services of the worker.

Factors that illustrate whether there was 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. There is no evidence to suggest the worker's automobile was purchased exclusively for business purposes. Presumably the automobile was also used by the worker for his personal needs; therefore, it is not considered a significant business investment. The firm paid the worker a guaranteed minimum amount and the risk of loss was absent. These facts show that the firm retained control over the financial aspects of the worker's services.

Factors that illustrate how the parties perceived 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 were part of the service recipient's regular business activities. In this case, the worker was not engaged in an independent enterprise, but rather the sales services performed by the worker were a necessary and integral part of the firm business of providing insurance premium financing services. 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 business. The worker could have performed similar services for others during the same time period; however, it is possible for a person to work for a number of people or firms concurrently and be an employee of one or all of them. These facts show that the firm retained control over the work relationship and services of the worker.

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 for all services, and not an independent contractor operating a trade or business.