

SS-8 Determination—Determination for Public Inspection

Occupation 02SAL Salespersons	Determination: <input checked="" type="checkbox"/> Employee <input type="checkbox"/> Contractor
UILC	Third Party Communication: <input checked="" type="checkbox"/> None <input type="checkbox"/> 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 her work status as an outside sales representative in tax years 2015 to 2019, for which she received Form 1099-MISC. The firm's business is described as an exterior home improvement company supplying and installing windows, siding, gutters, entry doors, and storm doors. The potential customer contacts the firm, the firm's staff sets an appointment at the customer's convenience, the firm sends a sales rep to give the customer an estimate

The firm's response was signed by the president. The firm's business is to sell and install residential windows, siding, and doors. The worker's job was to manage sales of exterior residential products. The firm provided leads to potential customers and after that the worker elected how and when to contact those leads, meeting with leads and deciding which product to sell to the lead.

The worker indicated that she was given training and instructions to sell the firm's way and how to measure for windows, doors, and gutters. The job assignments were conveyed through through firm's staff and the owner. 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. She indicated her services were rendered Monday through Saturday between 7 am and 8 pm, as scheduled by the firm. About 25% of her time was spent on the firm's premises to order the windows, doors, etc., pick up literature, and turn in orders with the customer deposits. The worker was required to attend training meetings and sales meetings. The worker was required to perform the services personally. The firm responded that there was no specific training and/or on-going instructions given. The jobs were as of a result of the firm sending leads to a website and the worker could select which leads to contact and when. The worker determined the methods by which the worker's services were performed. Any problems or complaints encountered by the worker were resolved by both parties. The services were rendered at customer locations and according to the worker's schedule. The firm indicated the worker was not required to perform the services personally; and, any additional personnel were hired and paid by the worker.

The worker stated the firm provided for monogrammed shirts (the firm reimbursed her), surface pro tablet, business cards, order forms, and literature. The worker furnished a vehicle and incurred the expense for vehicle maintenance and meals. The worker did not lease equipment, space, or a facility. The worker was paid a commission, with no guaranteed minimum and no drawing account available. The customers paid the firm. The worker noted that if she measured incorrectly or if the installation required additional labor not on the work order, the firm withheld the cost from her commission check. The firm's owner established the level of payment for services provided and/or products sold. The firm acknowledged providing brochures. The worker furnished vehicle and fuel, phone, office supplies, and the overhead to run her own business. The firm paid the worker a commission. The customers paid the firm. The worker was not covered under the firm's workers' compensation insurance policy. The firm indicated the worker had all the financial risk in this work relationship. The firm established the level of payment for services provided and/or products sold.

The firm and worker concur there were no benefits extended to the worker. The firm indicated either party could terminate the work relationship without incurring a liability or penalty; the worker disagreed stating she was not paid for installations sold prior to her departure. The worker was not performing same or similar services for others during the same time frame; the firm did not respond, but noted the worker was not required to obtain the firm's approval. Both parties agree the worker had no responsibility to solicit new customers and the worker was provided with the leads. The worker stated she had to report on the customers who did not purchase and why and who they purchased from. All orders were submitted to and subject to firms approval with deposit or financing approved. The services were rendered under the firm's business name.

The firm provided copies of emails indicating the worker would have been considered a direct seller. IRC 3508(b)(2) provides that a worker is a direct seller if the following qualifications are met: 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 the sale of consumer products for resale in the home or in other than a permanent retail establishment; 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; 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. No contract existed between the firm and worker.

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.

Training a worker by requiring an experienced employee to work with the worker, by corresponding with the worker, by requiring the worker to attend meetings, or by using other methods, indicates that the person or persons for whom the services are performed want the services performed in a particular method or manner. This is true even if the training was only given once at the beginning of the work relationship.

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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.

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. Also, if the firm has the right to control the equipment, it is unlikely the worker had an investment in facilities.

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.