

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 his work status as an outside sales and training person in tax years 2014 to 2019, for which he received Form W-2. As a result of tax law change in 2018 the worker cannot deduct unreimbursed employee expenses; therefore, the worker he would like to be classified as a statutory employee. The firm's business is described as fine wine, spirits, and non-alcoholic beverage sales.

The firm's response was not signed; however, a subsequent conversation was held with the Chief Financial Officer. The firm's business is wholesale distribution of wine, beer, and spirits. The worker provides services as a sales representative and is managed by one of the firm's regional managers who oversees their work and customer base.

The firm and worker acknowledge the firm provides and the worker attends monthly sales training meetings and five general sales training meetings plus interactions with the regional manager. The worker stated his job assignment is to scout out the owner of a prospective business with the correct liquor license; however, the firm indicated the job assignments came from the regional sales manager. Both parties concur the firm determines the methods by which the worker's services are performed; and, that any problems or complaints encountered by the worker are directed to the firm for resolution. Mileage and sales reports are required from the worker. The worker stated his routine includes all hours of the week, weekend promotions, and training events with the services rendered 85% of the time on the road and 15% at trainings and wine tastings. The firm responded the worker's services are rendered 8 am to 6 pm servicing approximately 90 customers in a specified geographical area. Both parties agree the worker is required to attend monthly sales meetings, five annual general sales meetings, supplier and regional sales meetings, and winery trips. The firm stated that non-attendance could result in the worker being written up and possibly losing his job. The worker is required to perform the services personally; any additional personnel are hired and paid by the firm.

The worker stated the firm provides catalogs, overnight expenses, travel miles through a tracking APP; and, that he furnished sales calls, presentations, restaurant waitstaff, and management training. The firm reimburses him for overnight travel expenses and mileage reimbursement. The worker does not lease equipment, space, or a facility. The worker indicated he receives a commission, is guaranteed \$XXX, and is allowed a drawing account for advances annually; but, stated he has never used it. According to the firm, the worker is provided with an iPad, charger, and keyboard. It is noted that the worker's email is through the firm's email address. The worker furnishes nothing. The worker does not lease equipment, space, or a facility. The worker is reimbursed for mileage per IRS rates, cellphone allowance, parking, and tolls or EZ-pass, and any other legitimate expenses with receipts. (It's a dollar for dollar reimbursement.) The worker is not responsible for printing menus, flyers, or anything else since the firm has a marketing department, and the firm will reimburse the worker as long as he submits the request. There is no requirement that the worker wine and dine customers; but, if he did he would be reimbursed for the lunch. The worker is paid a salary and commission and is allowed a semi-monthly draw against commissions. The firm and worker concur the customers pay the firm. The are also in agreement that the worker is covered under the firm's workers' compensation insurance policy, that the worker is not at risk for a financial loss in this work relationship, and the worker does not establish level of payment for services provided or products sold.

Both parties confirmed the benefits extended to the worker consist of paid vacations, sick pay, paid holidays, personal days, matching 401(k), insurance, and bonuses. The worker was furloughed during Covid-19 and the firm covered his insurance during that time. Either party could terminate the work relationship without incurring a liability or penalty. The worker is not performing same or similar services for others. The worker is a sales representative and employee.

The firm provided a copy of the job application in April 2009, the Sales Representative position description (which covered who he reported to, the job summary, the essential duties and responsibilities, qualifications, and physical standards) and the offer of employment (payment of a bi-weekly salary with applicable state and federal tax withholding, designated monthly auto allowance for use of his personal vehicle, other benefits as listed in the Employee Handbook, and a 90-day orientation and training period).

Both parties acknowledged that the worker and his representative discussed the worker being a statutory employee. The firm takes the position that the worker is a common law employee.

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.

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.

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.

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.

To determine whether salespersons are employees under the usual common-law rules, each case is evaluated on its own merit, in this case the SS-8 process. If a salesperson who doesn't meet the tests for a common-law employee, and are independent contractors under the common law rules, such workers may nevertheless be treated as employees by statute (statutory employees) for certain employment tax purposes if they fall within any one of the four categories (see Publication 15-A) and meet the three conditions described under Social Security and Medicare taxes.

We have considered the information provided by both parties to this work relationship. In this case, 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 and business reputation and to ensure its customers' satisfaction and that its contractual obligations are met. The firm provides regular training to ensure the worker is knowledgeable as to products and the firm's expectations. The worker is not operating a separate and distinct business; the worker does not have an investment of 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. The worker is guaranteed payment in addition to commissions earned, entitled to employee benefits, and applicable withholdings for social security and Medicare taxes, and federal and state income tax. 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 is not engaged in an independent enterprise, but rather the services performed by the worker are a necessary and integral part of the firm's business.

CONCLUSION

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; therefore, the worker is not a statutory employee.