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

Department of the Treasury - Internal Revenue Service

SS-8 Determination—Determination for Public Inspection

Occupation 09DVC Drivers & Vessel Control	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 worker initiated the request for a determination of his work status as a vendor (delivery driver of bakery goods) in tax years 2014 and 2015, for which he received Form 1099-MISC. In this capacity he drove to the storage unit, picked up the truck, loaded the truck, made deliveries, returned the truck to the firm. The firm's business is described as vending.

The firm's response was signed by the owner. The firm's business is the distribution of snack cakes for a corporation. The worker provided services as a driver and merchandiser, selling products to stores and that paid him or the corporation.

The worker stated he was given specific training and instructions from the firm's owner and was required to become DOT certified. The job assignments came from the firm as well as information as to product promotions and offers. The firm determined the methods by which the worker's services were performed; and, any problems or complaints encountered by the worker were directed to the firm for resolution. He indicated he was required to call in at the start of day and to turn in invoices daily. The worker's services were rendered 8-12 hours per day, Monday through Saturday and he spent 90 minutes at each location. The worker was required to perform the services personally; any additional personnel being hired and paid was not applicable.

The firm responded that the worker was given training and instructions as to basic store locations and a route map. In a conversation, the firm stated the route given to the worker was established and the worker had no obligation to solicit new customers. The worker's job assignments and the methods by which her performed them were self-determined. Any problems or complaints encountered by the worker were resolved by the worker. The services were rendered according to worker's schedule at customer locations. The worker was not required to perform the services personally; any additional personnel were hired and paid by the worker.

The worker indicated the firm provided saleable goods, a truck, unloading equipment, vending equipment, storage facility, and fuel. The worker furnished nothing; he did not lease equipment, space, or a facility and did not incur expenses. He did state that after being hired he was told he needed internet seervice. The worker was paid a salary and commission – he was guaranteed $XXX/week; the customers paid the firm. The worker was not covered under the firm's workers' compensation insurance policy. The worker responded he was at risk for a financial loss in this work relationship for monetary and product shortage or discrepancies. The worker did not establish level of payment for services provided or products sold.

According to the firm, the work relationship with the worker was unique because the firm generally contracted with corporations that had their own trucks. In this case, the firm provided the truck and a handheld/printer. The worker furnished a charging station, internet, and products. The worker did not lease equipment, space, or a facility. The firm paid the worker a commission, with a guaranteed $XXX/week. The firm indicated the customers paid the worker and the corporation, not the firm. The worker was not covered under the firm's workers' compensation insurance policy; worker was at risk for a financial loss in this work relationship for damage to vehicle, damage to computer, and products out-of-date. The worker did not establish the level of payment for services rendered or products sold.

Both parties concurred that there were no benefits extended to the worker; the worker stated he was entitled to bonuses. Either party could terminate the work relationship without incurring a liability or penalty. The firm indicated the worker was performing same or similar services for others during the same time frame; the worker disagreed. The worker and firm concurred that the worker had no responsibility in soliciting new customers, and the firm determined the routes for already established customers.

The firm and worker provided the independent contractor agreements which contained the following: pre-trip inspections of vehicle; delivery of merchandise, keep shelves stocked, ordering of merchandise; the organization of all paperwork and turned in daily; maintaining a courteous relationship with store employees and management; worker was responsible for product and monetary shortages; the worker was paid $XXX/week during training and upon completion of training he received Y% of total sales or a $XXX minimum per week with the worker responsible for 60% of stale products and firm responsible for 40%; pay day every Wednesday. The worker was responsible for income and self employment taxes, medical costs, and property damages that could result.

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.

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.

The fact that the person or persons for whom the services are performed furnish significant tools, materials, and other equipment tends to show the existence of an employer-employee relationship.

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.

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.

The firm's statement that the worker was an independent contractor pursuant to an agreement is without merit. For federal employment tax purposes, it is the actual working relationship that is controlling and not the terms of the contract (oral or written) between the parties.

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.