



DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
WASHINGTON, D.C. 20224

OFFICE OF THE CHIEF COUNSEL

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Dear _____ :

Thank you for your inquiry concerning the impact that The Tax Cuts and Jobs Act, P.L. 115-9 has on insurance salespersons. Specifically, you note that commission-based salespersons historically treated as common law employees are now at a disadvantage to similarly situated salespersons that are either independent contractors or statutory employees. You ask that the Internal Revenue Service (IRS) reevaluate its historic position that limits the definition of a full-time life insurance salesman under section 3121(d)(3)(B) of the Internal Revenue Code to workers who primarily sell life insurance and annuity contracts for one insurance company, and allow such definition to include workers who also sell accident and health insurance.

As you know, a full-time life insurance salesman as described in section 3121(d)(3)(B) includes only those workers who are NOT common law employees. The criteria for determining a worker's status as an employee or an independent contractor for taxes under the Federal Insurance Contributions Act, the Federal Unemployment Tax Act, and for federal income tax withholding purposes are found in sections 31.3121(d)-1, 31.3306(c)-2 and 31.3401(c)-1 of the Employment Tax Regulations. These regulations provide, in general, that if the worker provides services under the direction and control of the service recipient, the worker is considered an employee for employment tax purposes. The rules reflect common law principles, developed and affirmed over decades by the courts, that govern IRS policy in this area. Under these common law principles, even a full-time life insurance salesman may properly be classified as a common law employee if he or she is subject to the direction and control of the service recipient. In other words, the type of insurance sold by a worker is not, by itself, determinative of the worker's status as a common law employee, statutory employee, or independent contractor. Instead, the service recipient's authority to exercise direction and control over the worker providing the services determines a worker's status as a common law employee.

The term “full-time life insurance salesman” used in section 3121(d)(3)(B) is not defined in the Code but is defined in legislative history as “an individual whose entire or principal business activity is devoted to the solicitation of life insurance and annuity contracts primarily for one life-insurance company . . . [NOT] an individual who is engaged in the general insurance business under a contract or contracts of service which do not contemplate that the individual’s principal business activity will be the solicitation of life insurance and annuity contracts for one company, or any individual who devotes only part time to the solicitation of life insurance or annuity contracts . . .” Senate Report No. 1669, 81st Cong., C.B. 1950-2, 302, at 347. You correctly note that the rulings that narrowly interpret statutory employee to only permit a de minimis amount of sales from accident and health insurance were written in the early 1950’s and have not been updated to reflect industry changes. However, they still reflect the IRS’s interpretation of the law.

Revenue Ruling 54-312, 1954-2 C.B. 327, clarified by Rev. Rul. 59-103, 1959-1 C.B. 259, provides that the entire or principal business activity of an individual is deemed to be devoted to the solicitation of life insurance or annuity contracts primarily for one life insurance company when, pursuant to the terms and conditions of the arrangement with the life insurance company or its general agent, it is mutually agreed or clearly contemplated by the parties that the individual's entire or principal business activity is the solicitation of applications for life insurance or annuity contracts.

Rev. Rul. 59-103 clarifies that the reference to the sale of accident and health insurance in Rev. Rul. 54-312 was intended to relate only to the incidental sale of that type of insurance, and the definition of “full-time life insurance salesman” includes “only those individuals engaged primarily in the sale of life insurance and annuity contracts and not individuals engaged primarily in the sale of accident and health insurance.”

After careful consideration, we believe a legislative change is needed to expand the definition in the way that you request. Given the specific statutory language in 3121(d)(3)(B), i.e., “full-time life insurance salesman,” supported by the Senate Report indicating that such language does not include one in the general insurance business or one who only sells life insurance part-time, and in view of our position as reflected in published guidance, we think broadening the definition of a “full-time life insurance salesman” for purposes of section 3121(d)(3)(B) would require a legislative change. Because the Office of the Tax Legislative Counsel in the Treasury Department makes the recommendations for tax law changes, we have forwarded a copy of your letter to that office.

I hope that you will find this information helpful. If we can be of any further assistance, please contact me at () .

Sincerely,

Lynne Camillo
Branch Chief, Employment Tax Branch 2
Employee Benefits, Exempt Organizations and
Employment Tax