

**SS-8 Determination—Determination for Public Inspection**

Occupation 02COM.8 Communicator	Determination: <input checked="" type="checkbox"/> Employee <input type="checkbox"/> Contractor
UILC	Third Party Communication: <input checked="" type="checkbox"/> None <input type="checkbox"/> Yes

**Facts of Case**

The firm is in the business of publishing and production of sports programs for school districts and engaged the worker as a telemarketer from 2011 through 2014.

The firm stated they gave sample wording but it is not required to be used. The worker received her assignments from the firm in the form of index cards to call businesses, in order to solicit advertising for a school sports program. The index cards were given out on Mondays. The parties disagree on who determined the methods used to complete the tasks, each saying the other makes the decision. The firm stated any problems or complaints were reported to them. The firm asserted that there was no set schedule or hours, the worker was free to work at her discretion. However, the worker stated her schedule was Monday through Thursday from 9:00 A.M. until 5:00 P.M. with an hour lunch break and Fridays from 9:00 A.M. until 12:00 P.M. The worker performed her services at the firm's location. The firm stated that they have space available at their location if it is more convenient for the worker. If any substitutes or helpers are needed they each stated the other was responsible to hire and pay them.

As stated above, the firm provided the worker office space and office supplies at her convenience but was not required to be used, while the worker provided her cell phone, supplies and a vehicle. The worker indicated that the firm provided leads, office supplies and equipment. The worker stated she did not provide any supplies, equipment, materials or property to perform her services nor did she incur any business expenses. The parties confirmed the worker did not lease any equipment, space or facilities. The worker was compensated on commissions only, receiving 15% of what she sold. The firm received the payment from the customer. The parties differ on who established the level of payment. The firm stated that the worker set the prices, yet the worker maintains that when she received her index cards to call there was also a price sheet with "Pitch Prices" on it.

There was a written contract describing the terms and conditions of the relationship. The worker indicated she did not perform the same or similar services for others and there was no information submitted or discovered indicating the worker provided her services for others. The worker did not advertise, did not maintain a business listing or a business office. The worker performed her services in the firm's name. Either party could terminate the relationship at any time without incurring a liability; in fact, the relationship has ended.

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## Analysis

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After analysis of the common law factors as they related to this case, we find that the firm exercised sufficient control over the worker to establish the existence of an employer-employee relationship.

The firm maintained the right to direct and control the worker, which is an indication of behavioral control. Although the worker may determine her own methods to complete her work assignments, we believe the firm retains the right to change her methods to protect their business interest. 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. This is evident in the contract the firm submitted where they state, "[REDACTED] reserves the right to replace you if sales are not being made in a timely fashion."

The firm determined the rate charged the customers, and provided the worker office space and office supplies, which is an indication of financial control. The firm stated that the worker provided a vehicle. However, the worker did not obtain her vehicle specifically for the purpose of soliciting advertising, and did not limit the use of the vehicle for the performance of her work. The worker was not engaged in an independent enterprise requiring capital outlay or the assumption of a business risk. The worker could not realize a profit or incur a loss as a result of her services to the firm. 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.

There was a written contract describing the terms and conditions of the relationship. However, for Federal tax purposes it is the actual working relationship that is controlling and not the terms and conditions of a contract be it written or verbal between the parties.

There was no business risk for the worker, and either party could terminate the relationship at any time; indicating the relationship of the parties was employer-employee. The relationship between the parties was not a one-time transaction but rather a continuous one which lasted for more than three years.

Accordingly, the worker was an employee of the firm for purposes of Federal employment taxes.