

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

Occupation

OFF02.248 OfficeWorker

Determination:

 Employee Contractor

UILC

Third Party Communication:

 None Yes**Facts of Case**

The worker submitted requests for a determination of worker status in regard to services performed for the firm as an insurance sales worker. The work performed by the worker included mostly customer service to support the firm's other agents, i.e. answering phones, assisting customers, filing, etc. The worker is not licensed as an insurance agent or broker. The firm issued the worker Form 1099-MISC for tax years 2012 through 2016. A related business entity also issued the worker Form 1099 for 2012 and 2015. The worker filed Form SS-8 as he believes he erroneously received Form 1099. The worker believes he was an employee as he was required to report to the firm's office for direction and assignments. There was no written agreement between the parties, only a verbal agreement.

The firm's response stated it is an insurance services/agency business. The work done by the worker, beginning in 2012, was lead generation. The worker was classified as an independent contractor as he was paid commissions only based on the services he provided. The firm had no control on the worker's schedule, hours worked, methods of how he obtained his own client leads, how much he was paid, and any other companies he also provided the same services. The worker also received payment under another tax identification number due to a reorganization which resulted in the firm changing its operating name.

The firm stated it did not provide the worker training or work assignments. The firm's CEO was contacted if problems arose. The worker primarily resolved problems in accordance with the firm's policies. The firm required the worker to prepare production/sales reports. The worker set his own schedule. Services were performed at the worker's home office. The firm required the worker to personally perform services. Substitutes or helpers were never used or needed. The worker stated the firm provided daily instruction and direction regarding preparation and sales activities. The firm determined the methods by which assignments were performed and assumed responsibility for problem resolution. The firm required the worker to prepare daily progress reports. The worker performed services, at the firm's office, on a regularly scheduled basis. The worker does not have a home office. His daily routine consisted of reporting to work at a certain time, working the phones, and then going on assigned jobs. The firm required the worker to attend a daily meeting. The firm hired and paid substitutes or helpers.

The firm stated it provided internet access. The worker provided all required supplies. The worker did not lease equipment, space, or a facility. The firm did not reimburse the worker for any expenses. Customers paid the firm. The firm paid the worker commission; a drawing account for advances was not allowed. The firm did carry workers' compensation insurance on the worker. The worker established the level of payment for the services provided. The worker stated the firm provided stationery, office supplies, and sales materials. The worker did not incur expenses in the performance of services for the firm. The worker was paid an hourly rate of pay and sometimes paid commission if he assisted with the sale of an insurance product. The worker did not establish the level of payment for the services provided.

The firm stated the benefit of bonuses paid for higher sales was made available to the worker. The work relationship could be terminated by either party without liability or penalty. The worker did perform similar services for others. The firm's approval was not required for the worker to do so. There was no agreement prohibiting competition between the parties. The worker was free to provide services to others. The firm was unaware of the manner in which the worker advertised. Products were not sold. The firm represented the worker as a contractor to its customers. The worker used his own name. In February 2017, the worker was contracting under his own firm. The worker stated he did not perform similar services for others, advertise, or provide proof of commercial liability insurance to the firm. The firm advertised. The firm represented the worker as an employee to its customers.

The firm stated the worker was expected to act in accordance with state regulations in connection with soliciting new customers. The worker provided his own leads. The worker was not required to report on leads, only sales. There were no terms and conditions of sale required by the firm. Orders were not submitted and subject to the firm's approval. No one determined the worker's territory. The worker did not pay for the privilege of serving customers. Sales occurred from the worker's own place of business. Lead generation was the service performed by the worker. The worker did not sell life insurance full time or other types of insurance for the firm. The worker stated he was responsible for following leads in soliciting new customers. The firm provided the worker leads to prospective customers. Daily reports were required pertaining to leads. Orders were submitted and subject to approval by the firm. The worker did not sell life insurance full-time. The worker assisted with the sale of other types of insurance for the firm. 60% of the worker's time was spent in the solicitation of sales.

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## Analysis

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The firm's office was contacted in attempts to obtain additional information and clarification of the information originally provided; however, the calls were not returned.

Generally, the relationship of employer and employee exists when the person for whom the services are performed has the right to control and direct the individual who performs the services, not only as to what is to be done, but also how it is to be done. It is not necessary that the employer actually direct or control the individual, it is sufficient if he or she has the right to do so.

Section 31.3121(d)-1(a)(3) of the regulations provides that if the relationship of an employer and employee exists, the designation or description of the parties as anything other than that of employer and employee is immaterial. Thus, if an employer-employee relationship exists, any contractual designation of the employee as a partner, coadventurer, agent, or independent contractor must be disregarded.

Therefore, a statement that a worker is an independent contractor pursuant to a written or verbal 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. Furthermore, whether there is an employment relationship is a question of fact and not subject to negotiation between the parties.

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. In this case, the firm required the worker to personally perform services. Furthermore, the services performed by the worker were integral to the firm's business operation. The firm required the worker to adhere to its policies and act in accordance with state regulations, report on production and sales, and it ultimately assumed responsibility for problem resolution. These facts evidence the firm retained the right to direct and control the worker to the extent necessary to ensure satisfactory job performance in a manner acceptable to the firm. Based on the worker's education, past work experience, and work ethic the firm may not have needed to frequently exercise its right to direct and control the worker; however, the facts evidence the firm retained the right to do so if needed.

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. In this case, the worker did not invest capital or assume business risks. 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. Based on the commission rate of pay arrangement the worker could not realize a profit or incur a loss.

Factors that illustrate how the parties perceive their relationship include the intent of the parties as expressed in written contracts; the provision of, or lack of employee benefits; the right of the parties to terminate the relationship; the permanency of the relationship; and whether the services performed are part of the service recipient's regular business activities. 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. Both parties retained the right to terminate the work relationship at any time without incurring a liability. There is no evidence to suggest the worker performed similar services for others as an independent contractor or advertised business services to the general public during the term of this work relationship. The classification of a worker as an independent contractor should not be based primarily on the fact that a worker's services may be used on a temporary, part-time, or as-needed basis. As noted above, common law factors are considered when examining the worker classification issue.

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.

The firm can obtain additional information related to worker classification online at [www.irs.gov](http://www.irs.gov); Publication 4341.