

SS-8 Determination—Determination for Public Inspection

Occupation 02REC.1 Recruiter	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 business as an executive search firm providing employment services to the public which engaged the worker as a recruiter from 2009 to 2011. This was pursuant to a written employment agreement between the parties.

The firm stated it provided online training to the worker. The worker added that he was only to use the methods, approach and procedures as defined by the firm. The employment agreement also stated the firm provided the worker with training, guidance and technical support. The firm stated the worker marketed his services to companies and generated his own work. The worker stated he received verbal instructions regarding the services to be performed. According to the additional offer of employment submitted by the worker, the worker was given specific written instructions as to what the worker was to focus on, expectations of the firm, daily activities, following the firm's "██████████", and established goals he was required to make. According to the offer of employment the worker was required to arrive no later than 9:00 AM every day. Make at least 25 marketing phone calls between 9:30 AM and 11:30 AM. Make at least 40 calls by noon and produce a daily phone call plan by 5:00 PM for the next day's calls. As per the worker the firm determined the methods by which the assignments were performed. The firm stated the worker determined those methods which both contradicts the worker and the offer of employment. Both parties agree the firm was responsible for problem resolution. The worker was required to submit verbal reports. He stated he performed the services only on the firm's premises. The firm stated the worker was issued a key- he came and went and used space available in the office, or his home office and occasionally worked remotely while traveling. The worker stated he was required to attend monthly meetings, and the penalty for not attending was a verbal reprimand. The firm stated there were only occasional meetings that the worker was not required to attend and there were no penalties. The relationship between the parties was continuous, as opposed to a one-time transaction. The worker was required to perform the services personally. The worker worked exclusively for the firm. His services were an integral and necessary part of the services the firm provided to its customers. The parties do not agree on who would have been responsible for hiring and paying any substitutes or helpers.

The firm admitted to furnishing the worker with office space, phone and computer, at no expense to him while the firm contracted his service. The firm stated the worker had home office expenses. The worker did not state he had a home office. According to the worker he did not furnish any of the tools or equipment used in performing the services. The worker did not lease equipment, but now leases office space due to the fact that the worker owns his own firm, which was started after providing the services for the firm. The terms, condition and level of payment are determined by the firm in some cases and the worker in others. The firm stated the fees to be charged were negotiated solely by the worker. The firm stated the worker incurred significant business expenses, the worker stated there were none. The worker received commissions based on customer sales. The information and evidence submitted shows the worker did not have a substantial investment in equipment or facilities used in the work, and did not assume the usual business risks of an independent enterprise while providing services to the firm.

Either party had the option to terminate the worker's services at any time without incurring a penalty or liability. There was a "non-compete" agreement and it was recognized by both parties that the company had preferred call on the individual's time and efforts as part of the employment agreement between the parties. All work produced became the property of the firm. All trade secrets and customers belonged to the firm's. He did not advertise his services in the newspapers or the classified telephone directory, or maintain an office, shop, or other place of business while performing services for the firm. In this case, the worker not only did not advertise his services, but he completed an application for a job. He was required to perform the services under the name of the firm and for the firm's clients. The relationship between the parties ended when the firm terminated the worker in February 2011. The worker then started his own firm March 2011.

Analysis

The worker performed personal services on a continuous basis for the firm. Work was performed on the firm's premises, on a regular schedule set by the firm. The firm provided all significant materials and a workspace to the worker. The worker could not incur a business risk or loss. The worker was paid commissions. The worker did not hold the services out to the general public until he was terminated by the firm. The above facts do not reflect a business presence for the worker, but rather, strongly reflect the payer's control over the worker's services and the worker's integration into the payer's business. The fact that the worker was not closely monitored would not carry sufficient weight to reflect a business presence for the worker. In fact, many individuals are hired due to their expertise or conscientious work habits and close supervision is often not necessary. Usually, independent contractors advertise their services and incur expenses for doing so. In this case, the worker not only did not advertise his services, but he completed an application for a job. This is a strong indicator that the worker is not an independent contractor. Based on the common-law principles, the firm had the right to direct and control the worker. The worker shall be found to be an employee for Federal tax purposes.