

SS-8 Determination—Determination for Public Inspection

Occupation 02SAL Salesperson	Determination: <input checked="" type="checkbox"/> Employee <input type="checkbox"/> Contractor
UILC	Third Party Communication: <input checked="" type="checkbox"/> None <input type="checkbox"/> 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 firm is an insurance agency. The worker is a full-time life insurance salesperson. The firm did not withhold taxes from the worker's remuneration in 2016 and 2017.

The firm submitted the contract, signed by the parties on September 15, 2016, stating among other things, that the worker's service is to sell life insurance by commission only; the services will include other tasks which the parties may agree on; the agreement may be terminated at any time by mutual agreement by the parties; commission for sales paid are in accordance with the insurance company's pay plan and as the worker and firm agree; upon termination, the worker is entitled to pro rata payment of compensation; the firm will reimburse the worker from time to time for reasonable and necessary expenses incurred by the worker in connection with providing the services upon pre-approval by the firm; the worker will maintain confidentiality; the firm maintains the right to any intellectual property; upon termination, the worker will return to the firm any property, documentation, records, or any confidential information which is the property of the firm; in providing services under the agreement, the worker is acting as an independent contractor and not as an employee; the firm does not contribute any taxes, insurance, benefits, etc.; the firm will pay commissions by the 20th of the following month; returned sales will be returned commission within the one year parameter; and the worker will not assign her obligations without the prior written consent of the firm.

Information from the parties supports that the firm did not train the worker. It was the worker's responsibility to generate leads and sales. The worker performed her services in accordance with the California Dept. of Insurance. If problems or complaints occurred, the worker contacted the involved insurance company. The worker scheduled her own hours. She was required to perform her services personally.

The firm provided the worker with the use of software, and access to client information and data. The worker provided her own transportation, office supplies, office equipment, personal computer, and phone. She did not lease equipment, space, or a facility. The insurance company provided advertising materials, and the required computer software and security key. Neither party indicated an investment by the worker in the firm or a related business.

The firm stated that it did not make benefits available to the worker. There were no agreements prohibiting competition between the parties. Any advertising was for the benefit of the insurance companies. The firm represented the worker as a life insurance specialist. The work relationship terminated when the firm and worker agreed to terminate the contract.

Analysis

Under the circumstances existing in the instant case, the firm did not exercise, or have the right to exercise, the degree of direction and control necessary to establish an employer-employee relationship under the usual common law rules for Federal employment tax purposes.

Internal Revenue Code (IRC) section 3121(d)(3)(A)(B)(C)(D) provides, in part, that workers in certain occupational groups who are not employees under the common law, are considered employees for FICA purposes if they received remuneration under certain circumstances. These categories, referred to as statutory employees, are:

1. Agent-drivers or commission-drivers;
2. Full-time life insurance salespersons;
3. Home workers;
4. Traveling or city salespersons.

Workers in these four occupational groups are employees for FICA tax purposes if they meet all of the following requirements, but do not meet the common law test:

1. The contract for service contemplates that the worker will personally perform substantially all the work;
2. The worker has no substantial investment in facilities; and,
3. There is a continuing work relationship with the person for whom the services are performed.

The answer to the question of whether it is contemplated that substantially all the services are performed personally by the individual must be determined based on all the facts and circumstances presented. The term "contract of service" as used in the Federal Insurance Contributions Act (FICA) means an arrangement, formal or informal, under which the particular services are performed. The requirement that the contract of service contemplates that substantially all the services to which the contract relates in the particular occupation are to be performed personally by the individual, means that no material part of the services to which the contract relates in such occupation will be delegated to any other person by the individual who undertakes the contract to perform such services.

If an individual has a substantial investment in facilities of the requisite character, he is not an employee within the meaning of IRC section 3121(d) (3), since a substantial investment of the requisite character standing alone is sufficient to exclude the individual from the concept of a statutory employee. Such facilities include equipment and premises available for the work or the enterprise as distinguished from education, training, and experience, but do not include such tools, instruments, equipment, or clothing that are commonly or frequently provided by employees.

If the service is performed in a single transaction, the individual is not an employee. The fact that the services are not performed on consecutive days does not indicate that the services are not performed as part of a continuing relationship. Work is considered to be of a continuing nature if it is regular or frequently recurring.

We have applied the law as cited above to the information submitted. The worker in this case meets the criteria for statutory employee as a full-time life insurance salesperson.