

SS-8 Determination—Determination for Public Inspection

Occupation 02SAL Sales Representative	Determination: <input type="checkbox"/> Employee <input checked="" 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 worker initiated the request for a determination of his work status as a sales representative (direct seller to the homeowners) in tax year 2017. The firm's business is described as a selling solar panel systems to residential homeowners and the installation of the solar systems.

The firm's response was signed by the payroll manager. The firm's business is described as residential solar sales and installation company. The worker was an energy advisor; he sold solar to residential home owners and received a commission.

Both parties provided a signed copy of the Direct Seller Agreement.
Excerpt:

For good and valuable consideration, the receipt and sufficiency of which is hereby established, Direct Seller and the Company hereby enter into this Agreement. This Agreement constitutes the terms of services to be provided by Direct Seller to the Company during the Term as defined herein. Direct Seller Represents and agrees that Direct Seller is not an employee of the Company for any purposes, including, but not limited to, the application of the Federal Insurance Contribution Act, the Social Security Act, the Federal Unemployment Tax Act, the provisions of the Internal Revenue Code, any state revenue, workers' compensation or taxation code relating to income tax withholding at the source of income and other benefit payments and third party liability claims. Instead, Direct Seller is a "Direct Seller" or "Seller" or "Independent Contractor" as defined in Publication 15A. Accordingly, Direct Seller Represents and agrees that Direct Seller is solely responsible for the timely payment of all taxes for any amounts paid to Direct Seller under this Agreement including, but not limited to, all federal, state, provincial or local taxes. Direct Seller further Represents and agrees that the Company is under no obligation to withhold any amounts for taxes for Direct Seller nor to inform Direct Seller of any tax obligations, prepare any tax reports, or transfer any amounts for taxes. Direct Seller Represents and agrees that this Agreement is not, and shall not be construed as, an offer or contract of employment for any period, an offer or guarantee of future employment, or an offer or guarantee of a future contractual relationship. Direct Seller Represents and agrees that this Agreement shall not be considered or construed to be a partnership or joint venture, and the Company shall not be liable for any obligations incurred by Direct Seller. Direct Seller shall not act as an agent of the Company, ostensibly or otherwise, nor bind the Company in any manner. Direct Seller is further not entitled to any benefit or right conferred by Company to its employees. Direct Seller, who is to perform the services set forth in this Agreement, agrees to be responsible for such services as are commensurate with and required by such position and any other services as the Company may assign or delegate to Direct Seller from time to time.

Analysis

Section 3121(d)(2) of the Code provides that the term “employee” means any individual defined as an employee by using the usual common law rules applicable in determining the employer-employee relationship. Common law flows chiefly from court decisions and is a major part of the justice system of the United States. Under the common law, the treatment of a worker as an independent contractor or an employee originates from the legal definitions developed in the law and it depends on the payer’s right to direct and control the worker in the performance of his or her duties. We generally use the facts of each case along with consideration of the common law to reach a conclusion.

However, before applying the common law in determining whether an employer-employee or an independent contractor relationship exists, consideration must be given to section 3508. Individuals who meet the criteria described under this statute are treated as independent contractors and not as employees for the FICA, FUTA, and federal income tax withholding purposes. Application of common law is not appropriate if the criteria to this section are met. The criteria to be considered in this case are as follows:

An individual is a direct seller if the following criteria are met:

1. The individual is engaged in the trade or business of selling consumer products to any buyer for resale (by the buyer or any other person) in the home or other than in a permanent retail establishment, or engaged in the trade or business of selling consumer products in the home or other than in a permanent retail establishment; or is engaged in the trade or business of the delivery or distribution of newspapers or shopping news (including any services directly related to delivering or distributing newspapers or shopping news);
2. Substantially all of the individual’s remuneration for these services is directly related to sales or other output rather than the number of hours worked; and
3. A written contract exists between the individual and the person for whom services are being performed which provides that the individual will not be treated as an employee for federal tax purposes.

CONCLUSION

This is to advise you that based on the information and documentation submitted, we conclude, regardless of whether or not the firm may have retained direction and control over the worker’s services, that the facts of this work relationship meet the criteria outlined in section 3508. Thus, the worker would not be considered an employee of the firm for federal employment tax purposes. Consequently, we determine the worker to be a direct seller according to section 3508(b)(2). Note that this statute only applies for federal employment tax purposes and is not necessarily used in determining a worker’s status for the purpose of worker’s compensation, pension eligibility or wage and hour laws.