

SS-8 Determination—Determination for Public Inspection

Occupation 02SAL.3 Salesperson	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 newspaper publishing. The worker provided her services to the firm in 2011 and 2012 as a sales account executive making phone calls, proof reading, and selling advertising for the firm’s newspaper and received the Forms 1099-MISC for these services.

The worker stated that the firm trained her to do all the tasks the job required such as; media sales training, procedural training, creative design training, account scout computer training and [REDACTED] sales training. The firm contends that they provided the worker the opportunity for voluntary third party training which the worker accepted. The worker received her assignments through cold calling, leads and assigned clients provided by the firm’s management, and the firm’s management determined the methods by which the assignments were performed. The firm maintains that the worker decided who to sell the ads to and she determined the methods by which this was performed. Both parties agree that if problems or complaints arose the worker was required to contact the firm’s management and they were responsible for problem resolution. The firm required the worker to submit weekly sales reports, top prospects, monthly sales, new accounts, and occasionally her plan for the day and updates on prospects and leads. The worker had a set schedule working eight to twelve hours daily, Monday through Friday, and several hours on the weekends. The firm expressed that the worker did not have a set routine, schedule or hours. She provided her services personally on the firm’s premises 20% of the time, her home office 20% of the time, and the firm’s customer’s locations 60% of the time. The worker was required by the firm to attend sales, staff, training and client calls meetings, and the penalty for poor attendance was termination. The firm reported that there were occasional sales meetings.

The firm provided all the necessary supplies and equipment the worker needed to provide her services such as; the office space, office supplies, business cards, stationary, phones, fax, copier, database, marketing material, and the key to the office to be used at any time. The worker supplied the home office, cell phone, lap top, car, gas and vehicle insurance. The worker did not lease any equipment and was reimbursed by the firm \$30.00 monthly for cell phone, and postage incurred while providing her services to the firm. The firm contends that the worker was not reimbursed for any expenses incurred in the performance of her services. Both parties agree that the worker received a monthly salary of \$4,000.00 and a commission for her services. The firm’s customers paid the firm for the services the worker provided. The firm established the level of payment for the services the worker provided.

The worker indicated that the firm provided the worker with paid holidays, sick pay, and personal days. The firm explained that no benefits were available to the worker. The worker did not perform similar services to others during the same time period. The worker was asked to sign an agreement that she will no longer have contact with any vendors, customers, or associates of any kind related to the firm upon her termination. She provided her services under the firm’s business name. The worker submitted a business card and indicated her services being performed under the firm’s name with the title of “account executive” along with their website ad under the firm’s name with the title of “account executives.” Both parties retained the right to terminate the relationship without incurring liability. In fact the relationship ended when the worker was fired on February 28, 2012.

Analysis

The application of the three categories of common law evidence to the available facts of the relationship indicates that the firm retained the right to direct and control the worker in the performance of her services. Accordingly, the worker was an employee of the firm for purposes of Federal employment taxes.

Worker status is not something to be selected by either the firm or the worker. Worker status is determined by the examination of the actual working relationship as applied to Internal Revenue Service code.

Hence, to clarify the Federal Government's position on worker status, we will be determining this case based on their common law practices in which the actual relationship between the parties is the controlling factor.

The firm trained the worker regarding the performance of her services. Training a worker by requiring an experienced employee to work with the worker, by corresponding with the worker, by requiring the worker to attend meetings, or by using other methods, indicates that the person or persons for whom the services are performed want the services performed in a particular method or manner. This is true even if the training was only given once at the beginning of the work relationship. The firm retained the right, if necessary to protect their business interest, to determine or change the methods used by the worker to perform her assignments. 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. The facts show that the worker was subject to certain restraints and conditions that were indicative of the firm's control over the worker. A requirement that the worker submit regular or written reports to the person or persons for whom the services are performed indicates a degree of control. The worker had a continuous relationship with the firm as opposed to a single transaction. A continuing relationship between the worker and the person or persons for whom the services are performed indicates that an employer-employee relationship exists. A continuing relationship may exist where work is performed in frequently recurring although irregular intervals. The worker rendered her services personally. 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. The worker's services were under the firm's supervision.

The firm provided the worker with the necessary equipment and materials. The fact that the person or persons for whom the services are performed furnish significant tools, materials, and other equipment tends to show the existence of an employer-employee relationship. Her pay was based on salary and commissions. Payment by the hour, week, or month generally points to an employer-employee relationship, provided that this method of payment is not just a convenient way of paying a lump sum agreed upon as the cost of a job. In such instances, the firm assumes the hazard that the services of the worker will be proportionate to the regular payments. This action warrants the assumption that, to protect its investment, the firm has the right to direct and control the performance of the workers. Also, workers are assumed to be employees if they are guaranteed a minimum salary or are given a drawing account of a specified amount that need not be repaid when it exceeds earnings. The worker could not have incurred a loss in the performance of her services for the firm, and did not have any financial investment in a business related to the services performed.

The worker worked under the firm's name, and her work was integral to the firm's business operation. The above facts do not reflect a business presence for the worker, but rather, strongly reflect the firm'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. Either the firm or the worker could terminate the agreement. The right to discharge a worker is a factor indicating that the worker is an employee and the person possessing the right is an employer. An employer exercises control through the threat of dismissal, which causes the worker to obey the employer's instructions. An independent contractor, on the other hand, cannot be fired so long as the independent contractor produces a result that meets the contract specifications.

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.