

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

Occupation 02SAL.12 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 designing, developing and manufacturing automated and manual X-ray inspection systems. According to the firm, the worker was engaged to teach the firm how to compete in [REDACTED] and how to find customers as well as to assist the firm in facilitating communications with potential and existing customers. The firm indicated that the worker was hired because of her expertise and contacts in the industry as a consultant. The worker provided her services in 2012 and 2013; there were no pay documents issued.

However, there was an offer letter, signed and dated by both parties in June 2012. The firm's offer letter was for a full-time position as a Sales Manager who would report directly to the firm. Her compensation was based on an annual salary, paid in monthly installments as well as sales commission based on an annual sales target. There was a bonus plan with outlined goals to achieve as well as paid time-off to include holiday, vacation and sick leave. Also included in the offer was a medical allowance and a laptop allowances along with reimbursement for various travel expenses. While the firm eventually acquired a [REDACTED] company, it appeared that it continued to compensate the worker after the acquisition.

According to the worker, she received on-the-job training in [REDACTED] at a customer's factory as well as webex-based 'internal only' training sessions; however the firm indicated that there was no training. The firm indicated that the worker's role was one of soliciting new customers. She generated her own leads but did not sell or distribute any products. The firm indicated that she received her work assignments via phone calls and emails from [REDACTED]; the managing director in [REDACTED] determined the methods by which the assignments were performed and would be contacted if any problems arose. The worker noted that she cold-called and set-up meetings from personal business contact lists; she attended trade shows scheduled by management, and attended seminars paid for by management. She, however, indicated that both she and the firm provided leads. Commission amounts were calculated quarterly –but no commissions were received. All orders were submitted to and subject to the firm's approval. Management assigned the worker her territory of [REDACTED]. She sold the X-ray Test/Inspection equipment at sales meetings taking place at customer facilities. Both agreed that the worker submitted trip reports; the worker included that she submitted prospect lists as well. The worker did not work set scheduled hours as the worker noted that communicating over various time zones required flexible work times. Meeting with customers usually entailed eight hour days. The firm concurred that the worker had no set scheduled hours and that she determined when to work. Both agreed that she worked out of her home office; the worker included that she was required to travel to the firm's [REDACTED] office for meetings with the manager (presumably once the [REDACTED] company was acquired) and was trained on equipment on site at the office as well. The worker also scheduled meetings with customers in [REDACTED] to discuss and sell equipment; the firm noted that there were no meetings. The firm noted that the worker was required to provide the services personally.

Both the firm and the worker agreed that the firm provided the laptop computer; the worker included that the firm also provided supplies, [REDACTED] cellphone, stamps, and a [REDACTED] account. The worker indicated that she provided nothing; however the firm noted that she provided a cell phone and number, photocopier, printer, desk, chair, office supplies and internet connection. The worker noted that all expenses were paid by the firm including air travel, taxi, hotel, per diem for meals, cell phone and home internet charges, highway tolls and fuel. The firm acknowledged that it paid for travel, cell phone and other costs as invoiced by the worker. The worker noted that she was paid a salary and had no other economic risk.

There were benefits, according to the worker such as paid vacations, sick pay, paid holidays, and personal days; the firm did not address this issue. Either party could terminate the relationship without incurring a liability according to the worker; however the firm noted that there would be a breach of the contract. The worker did not perform similar services for others; the firm disagreed as the worker advertised her own business and represented herself as a consultant. The offer letter included a non-competition/non solicitation clause. Business cards were provided by the firm. The worker noted that at first she was referred to as an employee; then after the [REDACTED] acquisition, as an independent contractor with her job circumstances and salary remaining the same. The relationship ended when the worker did not meet commission targets and her 'contract' expired.

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## Analysis

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In determining whether an individual is an employee or an independent contractor under the common law, all evidence of both control and lack of control or independence must be considered. The relationship of the worker and the business must be examined. Facts that show a right to direct or control how the worker performs the specific tasks for which he or she is hired, who controls the financial aspects of the worker's activities, and how the parties perceive their relationship should be considered. As is the case in almost all worker classification cases, some facts point to an employment relationship while other facts indicate independent contractor status. The determination of the worker's status, then, rests on the weight given to the factors, keeping in mind that no one factor rules. The degree of importance of each factor varies depending on the occupation and the circumstances.

Section 31.3401(c)-1(c) of the regulations states that generally professionals such as physicians, lawyers, dentists, veterinarians, contractors, subcontractors, public stenographers, auctioneers, and others in an independent business or profession in which they offer their services to the public are not employees. However, if a firm has the right to direct and control a professional, he or she is an employee with respect to the services performed under these circumstances. Often the skill level or location of work of a highly trained professional makes it difficult or impossible for the firm to directly supervise the services so the control over the worker by the firm is more general. Factors such as integration into the firm's organization, the nature of the relationship and the method of pay, and the authority of the firm to require compliance with its policies are the controlling factors. Yet despite the absence of direct control, it cannot be doubted that many professionals are employees.

Factors that illustrate whether there is a right to control how a worker performs a task include training and instructions. In this case, because of the worker's expertise and skills, the firm's control was more general yet it retained the right to change the worker's methods and to direct the worker to the extent necessary to protect its financial investment. No doubt the worker had considerable latitude as she was responsible for her own work schedule, whether at home or at customers' locations. However, the firm engaged the worker for her full-time services. The term "full-time" may vary with the intent of the parties and the nature of the occupation since it does not necessarily mean working an eight hour day or a five or six day week. But if the worker must devote substantially full-time to the business of the person or persons for whom the services are performed, such person or persons have control over the amount of time the worker spends working and, therefore, the worker is restricted from doing other gainful work. An independent contractor, on the other hand, is free to work when and for whom he or she chooses. In addition, the worker provided her services on a continuous basis throughout the time period involved. 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.

Factors that illustrate whether there is a right to direct and control the financial aspects of the worker's activities include significant investment, unreimbursed expenses, the methods of payment, and the opportunity for profit or loss. In this case, it is acknowledged that the worker worked out of her home; however, the firm reimbursed her for many of her expenses and costs involving travel. If the person or persons for whom the services are performed ordinarily pay the worker's business and/or traveling expenses, the worker is ordinarily an employee. An employer, to be able to control expenses, generally retains the right to regulate and direct the worker's business activities. Her compensation was an annual salary payable monthly, guaranteeing her monthly income, and therefore did not support the premise of having a significant business risk.

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. There were benefits and there was a written signed offer, designating the worker's position as a full-time Sales Manager. Employee-type benefits were not only offered but were actually given as evidenced by emails between the parties. While the worker may have had a business presence as a consultant in her area of expertise, when engaged by the firm to provide her services on a full-time basis, the elements of monthly compensation, reimbursed expenses, and benefits supported an employer-employee relationship along with the offer's intent.

The worker's services whether deemed as a consultant or sales manager were integral to the firm's establishment of a presence. When working for the firm, she was not engaged in an independent enterprise, but rather her services were part of the necessary activities of the firm's operations. 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.

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.