

SS-8 Determination—Determination for Public Inspection

Occupation 02SAL.29 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 mining, packaging, and selling trace mineral products. The worker was engaged to develop wholesale, dealer, retail and direct farm accounts to sell the product as fertilizer. Her title was Director of ██████ Region. She received a Form 1099-MISC for her services in 2009 through 2013. There was a written agreement referred to by the firm as an employment agreement.

The worker was provided with instructions, brochures, and power point information from the firm. However, the firm indicated that the worker was essentially training them as it did not have much experience in fertilizer sales. The worker received her work assignments from the firm though the firm indicated that the worker was self-directed. Both parties agreed that the worker determined the methods by which the assignments were performed with the worker adding she had oversight from the president and vice president of the firm. Both parties indicated that the worker would contact the firm if any problems or issues arose. The worker noted that she submitted reports to the firm, first weekly, then bi-weekly, then monthly; the firm noted that only sales orders were submitted. Both indicated that the worker set her own work schedule, whether in her office, at tradeshows or conferences, or meeting with farmers and dealers. Both also agreed that the worker's home office was her primary workplace as well as customers' locations. Two to three times a year, there were meetings at the firm's headquarters but the firm indicated attendance was not required. Both parties agreed that the worker was to provide the services personally. Both also agreed that the worker did not use helpers with the worker noting an exception that occurred when the firm sent helpers to two tradeshows.

The firm noted that it provided reimbursement for vehicle and tradeshow expenses; the worker noted that the firm provided a laptop, office supplies, brochures, product samples, and order forms. The worker noted that she provided a home office, and vehicle; the firm agreed. Both agreed that the worker leased part of her warehouse. The worker used part of her residence as a home office, a growing area for seed trials, and for mineral product storage. The worker incurred expenses for gas, hotel bills, phone bills, internet, plants, garden supplies, vehicle maintenance and health insurance. The firm reimbursed the worker for hotel bills, gas, office supplies, and meals while traveling as well as the worker's phone bill. Both parties agreed that the worker received a set monthly compensation as well as commissions on qualifying sales. Both also agreed that the customer paid the firm. The worker noted that she wore her car out by driving and by transporting minerals and trade show equipment. The firm noted that the worker established the level of payment for services; the worker noted that the firm did.

Both the firm and the worker agreed that there were no benefits. Only the firm indicated that either party could terminate the relationship without incurring a liability. The worker referred to the contract (which addressed compensation if services terminated.) The worker did not perform similar services for others during the same time period; the firm disagreed. There was a non-compete clause in the contract. The worker indicated that she had business cards, placed ads, attended tradeshows and conferences. She assembled sample product packages at home with the firm providing the material. The worker took orders for products which shipped from Utah or from various dealers. Both agreed that the worker represented the firm. The relationship ended when the worker resigned; the firm noted that she stopped returning phone calls.

The worker had the following responsibilities in soliciting new customers: making cold calls, visiting and meeting with customers, answering inquiries sent to her from the firm's website or main office, working with dealers and distributors. The firm noted that the worker developed business in ██████ to establish fertilizer sales and that the worker generated her own leads. The worker noted that she provided constant feedback via phone, email and monthly reporting; again the firm mentioned only sales orders and that she was not required to report on leads. The firm noted that its required terms were payment by the customer and a reasonable sales prices; the worker noted a credit check and an account set-up or prepaid were necessary. Both agreed that orders were submitted to and subject to the firm's approval and that the firm determined the worker's territory. The worker noted that she sold to individuals, farms, ██████ chemical distributors, ██████ dealers, garden shops, etc. The firm noted she sold from her home office and the firm fulfilled (the orders.) The worker sold remineralizing fertilizer. The sales were mostly to the end user but some to wholesalers as well; the worker noted that 95% of her solicitation time was spent on orders from wholesalers, retailers, contractors, or operators of hotels, restaurants, etc.

Analysis

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.

There were similarities between this case and Revenue Ruling 70-586, 1970-2 C.B.223. Sales agents engaged under contract by a manufacturing company that retains the right to direct and control their sales activities and pays them a specified percentage of the retail price of merchandise sold are employees of the company. A manufacturing company entered into contracts with sales agents wherein each agent agrees to carry out and develop the business of selling the products of the company in the territory assigned to him. Under the terms of the contract and agent must adhere strictly to the prices fixed by the company and be governed by the rules and regulations in existence when the contract went into effect plus any additions or amendment made thereto, or any other instructions that the company may issue from time to time. All sales made by an agent are subject to the acceptance and approval of the company. In this ruling, the manufacturing company had the right to direct and control the sales agents to the degree necessary to establish the relationship of employer and employee whether or not it exercised that right.

Factors that illustrate whether there is a right to control how a worker performs a task include training and instructions. In this instant case, the firm retained the right to change the worker's methods and to direct the worker to the extent necessary to protect its financial investment. It is acknowledged that the worker was not trained by the firm and that the worker was given considerable latitude in how and when her services were performed. She did not have to physically report to the firm's office on a regular basis, or keep set scheduled hours. However, the firm indicated that the worker's duties were to provide her full-time services to market the firm's product as a manufacturer's representative and service her accounts. 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. 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, the worker did not invest capital or assume business risks, and therefore, did not have the opportunity to realize a profit or incur a loss as a result of the services provided. The worker did work out of her home; however the firm provided a laptop, business cards, as well as reimbursed her for a variety of expenses she incurred. She received a set monthly compensation as well as 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. In fact, evidence was provided showing that the firm had expectations of services as they were paying the worker a base amount of compensation in addition to sales commissions. The firm also provided a car allowance and reimbursed the worker for a variety of traveling expenses. 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.

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 no benefits. But there was a written agreement that included a non-compete clause and was referred to as an employment agreement. In this case, the worker's services as a manufacturing representative, providing her services for only the firm, did not indicate that she was operating an independent business venture, but rather her services performed were a necessary and integral part firm's business operations which included the selling of its products. 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.