

SS-8 Determination—Determination for Public Inspection

Occupation 02SAL.34 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 worker initiated the request for a determination of his work status as a mobile marketing specialist in tax years 2013 and 2014. In this capacity the worker was to cold-call businesses and set up appointments regarding the acquisition of a mobile marketing campaign. The firm's business is described as a technology company that specializes in international inflight entertainment and the music industry. The worker was issued Form 1099-MISC to reflect his earnings.

The firm's response was signed by the firm's CEO. The firm's business is described as a high-tech marketing firm. The worker was in the sales department; all sales people duties were to identify and sell the firm's mobile services products. The firm indicated that all of the sales force were Independent Contractors as it was a new division for the company and sales levels were uncertain.

According to the firm, there were sales force training meetings at the office. The entire sales team had the same assignment - to go and get mobile advertising customers. The firm determined the methods by which services were performed; any problems encountered by the worker were directed to the firm for resolution. The selling hours were 8:30 to 5:00, in which calls were made from the office, home, or in person. The worker was required to perform the services personally.

The worker concurred that he was provided training and instructions throughout his time with the firm since he didn't know anything about mobile marketing prior to starting with the firm. He responded that the job assignments came from the firm during daily morning meetings. He did stated that he did perform the services Monday through Friday with 100% of his time spent on the firm's premises.

The firm responded that the worker was provided with a desktop in the office and sales materials. The worker did not lease equipment, facilities, or space. The firm paid the worker contract pay; the customer paid the firm. The firm indicated the worker was not at risk for a financial loss in this work relationship. The firm established the level of payment for services rendered and products sold. The worker was in agreement with the above statements, except that he stated he was paid a salary and commission.

Both parties acknowledged the worker was not entitled to benefits. Either party could terminate the work relationship without incurring a liability or penalty. The firm responded that the worker was to identify new customers and call or visit in person; the worker was to generate his own leads. The worker was required to provide the firm with a weekly status update. All orders were submitted to and subject to the firm's approval.

The firm provided a copy of Form W-9, Form 1099-MISC for 2013, and a contractor checkout list (for equipment, building access card, parking card, and suite key), and a copy of the separation agreement was provided indicating the work relationship would end 12/18/2013.

The worker indicated that he was responsible for cold calls, emails, and distributing mobile business card. He stated the firm provided him with leads and that he was an appointment setter; he gathered data (name of the decision-maker of a prospective customer as well as phone number and email address) and passed it on to a co-worker.

Analysis

A worker who is required to comply with another person's instructions about when, where, and how he or she is to work is ordinarily an employee. This control factor is present if the person or persons for whom the services are performed have the right to require compliance with instructions. Some employees may work without receiving instructions because they are highly proficient and conscientious workers or because the duties are so simple or familiar to them. Furthermore, the instructions, that show how to reach the desired results, may have been oral and given only once at the beginning of the relationship. See, for example, Rev. Rul. 68-598, 1968-2 C.B. 464, and Rev. Rul. 66-381, 1966-2 C.B. 449.

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. See Rev. Rul. 70-630, 1970-2 C.B. 229.

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. See Rev. Rul. 74-389, 1974-2 C.B. 330.

If the work is performed on the premises of the person or persons for whom the services are performed, that factor suggests control over the worker, especially if the work could be done elsewhere. See Rev. Rul. 56-660, 1956-2 C.B. 693. Work done off the premises of the person or persons receiving the services, such as at the office of the worker, indicates some freedom from control. However, this fact by itself does not mean that the worker is not an employee. The importance of this factor depends on the nature of the service involved and the extent to which an employer generally would require that employees perform such services on the employer's premises. Control over the place of work is indicated when the person or persons for whom the services are performed have the right to compel the worker to travel a designated route, to canvass a territory within a certain time, or to work at specific places as required. See Rev. Rul. 56-694, 1956-2 C.B. 694.

A person who can realize a profit or suffer a loss as a result of his or her services is generally an independent contractor, while the person who cannot is an employee. See Rev. Rul. 70-309, 1970-1 C.B. 199. "Profit or loss" implies the use of capital by a person in an independent business of his or her own. The risk that a worker will not receive payment for his or her services, however, is common to both independent contractors and employees and, thus, does not constitute a sufficient economic risk to support treatment as an independent contractor. If a worker loses payment from the firm's customer for poor work, the firm shares the risk of such loss. Control of the firm over the worker would be necessary in order to reduce the risk of financial loss to the firm. The opportunity for higher earnings or of gain or loss from a commission arrangement is not considered profit or loss.

We have considered the information provided by both parties and have applied the above law to this work relationship. In this 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 and business reputation and to ensure its customers' satisfaction and that its contractual obligations were met. The worker was not operating a separate and distinct business; 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. 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. In this case, the worker was not engaged in an independent enterprise, but rather the services performed by the worker were a necessary and integral part of the firm's business.

CONCLUSION

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.