

SS-8 Determination—Determination for Public Inspection

Occupation 02SAL.47 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 selling software products to assisted living and memory care facilities. The worker was engaged by the firm as its Director of Sales and Marketing to develop a marketing and sales plan. The firm reported the worker's remuneration on Forms 1099-MISC for 2013 and 2014.

The agreement between the parties, dated [REDACTED], states that the firm will pay the worker \$ [REDACTED] per month for the first six months, \$ [REDACTED] will be paid up front and the monthly payments will be made on the 10th of each month; after six months, the worker's status will be reviewed and pay will be renegotiated; the worker will submit approved expenses monthly for reimbursement; the worker will travel to the firm's premises to meet the firm's team and learn how the product works, and to get familiar with potential customers and competitors; and the worker will be available to travel to a conference from [REDACTED] through [REDACTED].

Information from the parties supports that the firm relied upon the worker's prior training and experience to perform his services. If problems or complaints occurred, the worker contacted the firm for resolution. The worker provided the firm with regular updates via weekly telephone conference calls. He determined his own schedule. The worker performed his services from his home office. He was required to perform his services personally.

The firm provided sales materials and the software product. It provided the worker with business cards and listed him on its website. The worker provided his office equipment, materials, and supplies. Customers paid the firm directly at prices established by the firm. The firm did not cover the worker under workers' compensation. Neither party indicated an investment by the worker in the firm or a related business, or the risk of the worker incurring a financial loss beyond the normal loss of compensation.

The firm did not make general benefits available to the worker. Both parties reserved the right to terminate the work relationship at any time without incurring a penalty or liability. The firm did not prohibit the worker from providing similar services for others during the same time period. There is no evidence presented that worker advertised his services or maintained a business listing. He provided his services under the firm's name.

Analysis

Workers in certain occupations will not be treated as employees for FICA, FUTA, or federal income tax withholding purposes provided they meet certain qualifications. These workers are referred to as "statutory non-employees." IRC 3508(b)(2) provides that, for all IRC purposes, direct sellers are statutory non-employees if the following qualifications are met:

- a. The worker is engaged in the sale of consumer products in the home or in other than a permanent retail establishment; engaged in delivering or distribution of newspapers; or engaged in sale of consumer products for resale in the home or in other than a permanent retail establishment.
- b. Substantially all of such worker's remuneration for services is directly related to sales or other output rather than to the number of hours worked.
- c. A written contract exists between the worker and the taxpayer for which services are being performed that provides that the worker will not be treated as an employee for federal tax purposes.

It appears that the worker does not qualify under 3508. The written contract between the parties does not state that the worker will not be treated as an employee for federal tax purposes. The firm paid the worker on a monthly salary basis; therefore, substantially all of such worker's remuneration for services is not directly related to sales or other output.

Factors that illustrate whether there was a right to control how a worker performed a task include training and instructions. In this case, while the firm relied upon the worker's prior training and experience to perform his services, the worker provided the firm with regular updates during weekly management meetings. 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 firm retained the right to change the worker's methods and to direct the worker to the extent necessary to protect its financial investment. While the worker generally provided services from his home office, indicating some freedom from control, this fact by itself does not mean that the worker is not an employee. The firm still required the worker to travel to its site, and required him to attend a conference on its behalf. The worker was required to perform his services personally, meaning he could not engage and pay others to perform services for the firm on his behalf. 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. These facts show that the firm retained behavioral control over the services of the worker.

Factors that illustrate whether there was 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. "Profit or loss" implies the use of capital by a person in an independent business of his or her own. Although the worker provided his office equipment and supplies, the term "significant investment" does not include tools, instruments, and clothing commonly provided by employees in their trade; nor does it include education, experience, or training. The firm paid the worker on a salary basis and reimbursed work related travel expenses. Workers are assumed to be employees if they are guaranteed a minimum salary. 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. These facts show that the firm retained control over the financial aspects of the worker's services.

Factors that illustrate how the parties perceived 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 were part of the service recipient's regular business activities. In this case, the worker performed his services under the firm's name. The worker was not engaged in an independent enterprise, but rather the services performed by the worker as the firm's Director of Sales and Marketing were a necessary and integral part of the firm's software business. 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 business. The worker could have provided similar services for other during the same time period; however, it is possible for a person to work for a number of people or firms concurrently and be an employee of one or all of them. Although the firm did not provide general benefits to the worker, both parties retained the right to terminate the work relationship without incurring a liability, a factor indicating an employer-employee relationship. These facts show that the firm retained control over the work relationship and services of the worker.

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.