

SS-8 Determination—Determination for Public Inspection

Occupation 02SAL.49 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 cabinet sales person in tax year 2013. The firm's business is described as wholesale distributor of major brands of kitchen cabinets and vanities.

The firm's response was signed by the operations manager. The firm's business is described as wholesale cabinets, etc. The worker performed services as an outside sales rep.

According to the firm, the worker was required to perform the services personally. The firm provided the worker with an iPhone which was returned when he departed in January 2014. The firm acknowledged the worker incurred expenses for mileage and was reimbursed for mileage. He was guaranteed a minimum salary. The customer paid the firm. The firm established level of payment for services provided and products sold.

The worker states that he was given training and instructions in the store and he rode with his direct boss. The job assignments/list of leads were provided by the firm. The firm determined the methods by which the worker's services were performed; any problems or complaints encountered by the worker were directed to the firm for resolution. The worker was required to furnish call reports which were completed on the firm's website/network. The worker was required to perform the services personally.

The firm provided samples and pricing literature. The worker furnished nothing; he did not lease equipment and did not incur expenses in the performance of the job as he was reimbursed for mileage expense incurred. The firm paid the worker a salary. The customer paid the firm. The indicated he was not at risk for a financial loss in this work relationship; the firm established the level of payment for services provided or products sold.

The benefits extended to the worker consisted of paid holidays and paid vacations. Either party could terminate the work relationship without incurring a liability or penalty. The worker was not performing same or similar services for others during the same time frame.

The worker was responsible for soliciting new business and doing a follow-up on leads provided; the worker provided any new leads to the firm. All orders were subject to firm's approval. The firm determined the worker's territory in which he sold to builders and retail stores. He was required to make 8-10 calls per day.

There was no contract between the parties that defined the work relationship and the intent of the parties. The worker furnished emails with reference as to payment every two weeks, mileage compensation, monthly allowance for customer entertainment and meals, iPhone, and territory. The worker also provided copies of checks for mileage reimbursement and copies of pay stubs for salary paid. The copy of the 2013 Form 1099-MISC provided to the worker by the firm is not the same as what the firm provided (different amounts). The 2014 Form 1099-MISC was not furnished by either party.

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.

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. See Rev. Rul. 55-695, 1955-2 C.B. 410.

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.

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.