

SS-8 Determination—Determination for Public Inspection

Occupation 02SAL.73 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 fabricating, assembling, and shipping permanent air filters. The worker was engaged by the firm as a salesperson. The firm reported the worker's remuneration on Form 1099-MISC for 2014.

The firm and worker submitted the agreement between the parties with the start date of May 19, 2014 stating among other things, the worker was the sales rep for all [REDACTED] products in [REDACTED] and [REDACTED] to solicit orders in accordance with the terms set forth by the firm; the worker will use his best efforts to promote and sell the product, and prove assistance to the firm in promotional activities such as trades shows, product presentations, sales calls, and other activities; the firm will provide the following: business cards, filter samples, email, air travel on a written pre-approved basis to include airfare, lodging, meals, rental car/fuel, and fuel for local automobile travel; the worker warrants that he is not currently representing products in competition with the firm, and shall devote full time to the firm's products; the worker is an independent contractor, neither party gives the other party control over day-to-day activities, the worker is not an employee of the firm and is not entitled to any employee benefits, the worker is responsible for paying all income taxes and other taxes on amounts earned, and all financial and other obligations are the sole responsibility of the worker; the worker's commission shall be an annual draw against commission of \$70,000 or \$2,693 paid bi-weekly, computed as 10% of gross sales until one million in volume is reached, at which time the commission will increase to 15% and be retroactive to the date of the agreement; the commission of 10% shall apply to all orders solicited by the worker that have been accepted by the firm; the worker is expected to produce sales of 2250 filters during the first 6 months at a minimum; the worker has the right, at his expense and not more than once a year, to inspect invoices and customer payments to verify the accuracy of the commission paid by the firm, if the firm has underpaid by more than 10%, the firm will reimburse the cost of the audit in addition to the amount of underpayment; the firm will provide the worker with copies of its current price lists, delivery schedules, and standard terms and conditions of sale, and the worker shall quote only those authorized prices in effect at the time the order is accepted; within 10 days, the worker shall furnish the firm with detailed contact information for all prospects, and provide copies of all quotations submitted to customers; all orders shall be in writing and sent directly to the firm; all orders and credit approvals are subject to final acceptance by the firm, the worker has no authority to make any acceptance or delivery commitments to customers, and the firm reserves the right to reject any order; during the first year, the agreement shall continue until terminated upon at least 15 days written notice, after one year, a 30 day notice is required.

The worker also submitted his business card stating his title of Director, Sales; the confidentiality agreement with a non-competition clause; numerous emails instructing the worker on how to answer potential customers' inquiries, how to sell, meetings scheduled on a sales trip, the firm discussing leads it provided to the worker, and instructions for various methods and techniques; training materials on how to use the firm's spreadsheet system; work assignments for a tradeshow; weekly sales reports which were discussed with the firm on a weekly basis; measurement form; sales lead report which was required for every lead; sales pipeline-project management report; and expense reimbursement report.

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 operations manager for resolution. The worker set his daily routine and schedule. He decided where he performed his services. The firm stated that the worker was not required to perform his services personally.

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.

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. Although the written contract between the parties states that the worker will not be treated as an employee, the firm provided the worker a base yearly compensation. Although the amount states it is a draw against commission, there is no requirement that it be repaid when it exceeds earnings, and therefore, substantially all of the 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, the firm provided the worker with instructions. It retained the right to change the worker's methods and to direct the worker to the extent necessary to protect its financial investment. The worker provided services from his home. 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. Although the firm stated that the worker was not required to perform his services personally, there is no indication that he engaged and paid others to perform services for the firm on his behalf. 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. Lack of significant investment by a person in facilities or equipment used in performing services for another indicates dependence on the employer and, accordingly, the existence of an employer-employee relationship. The firm paid the worker on a commission basis. The opportunity for higher earnings or of gain or loss from a commission arrangement is not considered profit or loss. The firm made regular bi-weekly payments to the worker. 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. The firm reimbursed the worker for work related 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. 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 sales services performed by the worker were a necessary and integral part of the firm's business of selling, fabricating, assembling, and shipping permanent air filters. 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. Although the firm did not provide benefits to the worker, the work relationship terminated with neither party 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.