

SS-8 Determination—Determination for Public Inspection

Occupation 02SAL.96 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 her work status as an insurance agent in tax years 2013 through 2016. The firm's business is described as an insurance agency. In her position she sold insurance products, answered phones, collected payments, made bank deposits, balanced checkbook, scheduled owner's appointment, and greeted customers. The percentage of time for insurance sales v. administrative functions was about 50/50, even though she was hired as a sales agent.

The firm's response was signed by [REDACTED]. The firm's business is described as for companies offering home, auto, life, health, dental, workers' compensation, Medicare, general liability, etc. The business was sold as of March 1, 2016 as part of a planned retirement. The worker performed services as an insurance sales agent licensed by the state of [REDACTED].

According to the firm, the worker was not given training by the firm. There were continuing education requirements and insurance company specific trainings requirements. Her work assignments were a result of walk-in customers, referrals, and her individual initiative. The methods by which she performed her services were determined by the insurance companies and the [REDACTED]. The firm responded that the worker determined her schedule and routine, 80% of her time was spent at the firm's office with the remainder at customer location and her home office. The worker was not required to perform the services personally.

The worker indicated she was given specific training and instructions by the firm on how to lead medical insurance seminars, [REDACTED] training. She stated the job assignments came from the firm and it was the firm that determined the methods by which the worker's services were performed. Most of her time was at the firm location and 10% was out with the firm for group sales meetings. She did some evenings doing work at home as a result of [REDACTED] and people looking for responses to inquiries; it was mostly administrative-type work.

The firm responded that the worker was provided a computer. The worker furnished a home office computer, cell phone, vehicle, and personal business cards. The worker did not lease space, equipment, or facilities. The worker incurred the expenses for her license, continuing education, and business cards. The firm paid the worker a guaranteed base salary plus commissions. The customers paid the firm. The firm indicated the worker was at risk for a financial loss if she was sued. The firm responded that the insurance companies established payment procedures.

The worker indicated the firm provided a desk, computer, [REDACTED] insurance, printer, and bond. She acknowledged that she furnished a cellphone and home computer and some office supplies; and, she did not lease equipment and did not incur expenses in the performance of the job. She concurred that she was paid a weekly salary and commissions. The customer paid the firm. She stated she was not at risk for a financial loss in this work arrangement.

Both parties agreed that benefits of paid vacations, sick pay, paid holidays, and personal days were extended to the worker. Either party could terminate the work relationship without incurring a liability or penalty, with a 30-day notice. The firm stated the worker was performing same or similar services for others during the same time frame; the worker disagreed. The worker was not a full-time life insurance sales person but sold 100% of other types of insurance.

The firm and worker provided a copy of the [REDACTED]: the worker was selling and serving insurance products offered by the firm; worker was paid a base rate and commission that was adjusted yearly; annual and sick leave benefits and 12 paid holidays; office hours are Monday through Friday from 9 a.m. to 5 p.m.

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.

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.

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..

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. 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.

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. "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.

The firm's statement that the worker was an independent contractor pursuant to an agreement is without merit. For federal employment tax purposes, it is the actual working relationship that is controlling and not the terms of the contract (oral or written) between the parties.

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.