

SS-8 Determination—Determination for Public Inspection

Occupation 02SAL.115 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 producing natural remedies for dogs. The worker was engaged as a sales representative who contacted vets to see if they would carry the firm's products for resale. She received a 2014 and 2015 1099-MISC for her services. There was no written agreement in place.

The firm indicated that it provided no training; however, according to the worker, the firm paid for an online sales training course. There were email communication trainings, training sheets and [REDACTED] meetings as well. The firm noted that there were no work assignments but the worker noted that she would be contacted via email if any additional tasks were assigned. The leads were provided by the firm and through the worker's efforts. She cold called, made personal visits, emailed, and Skyped. The firm agreed that it provided the worker with leads that came in through its website. Both agreed that all orders were submitted to and approved by the firm. The worker worked out of her home office. The worker sold the product to some retailers and veterinarians for resale; she was a sales representative and did not handle or distribute the product. Only the worker indicated that the firm determined the methods by which the assignments were performed. Both parties agreed that the firm's supervisor would be contacted if any issues or problems arose. Both also agreed that the worker was to submit sales reports which included information on orders and commissions. The worker noted that she was required to use the 'time sheets' to clock-in/out; the firm noted that the worker worked whenever she wanted to. Both parties agreed that the worker worked from her home. Only the worker noted that she was required to provide the services personally and that the firm would need to approve and pay any substitute workers.

Both the firm and the worker agreed that the firm provided product samples. The worker also noted that the firm provided the business cards, account leads, personalized email address and firm letterhead. Both parties agreed that the worker provided a computer, cell phone, and vehicle. The worker was not reimbursed for any of her expenses such as gas, electricity, or cell phone service. Both parties agreed that she was paid a base salary plus commission and that she had no other economic risk. The customer paid the firm. Only the firm mentioned that the level of payment for services was mutually agreed upon.

Both the firm and the worker agreed that there were no benefits though the worker noted that there were quota bonuses. Either party could terminate the relationship without incurring a liability. The worker did not perform similar services for others. There was no written, signed agreement. The relationship ended when the worker was fired.

Analysis

In determining whether an individual is an employee or an independent contractor under the common law, all evidence of both control and lack of control or independence must be considered. The relationship of the worker and the business must be examined. Facts that show a right to direct or control how the worker performs the specific tasks for which he or she is hired, who controls the financial aspects of the worker's activities, and how the parties perceive their relationship should be considered. As is the case in almost all worker classification cases, some facts point to an employment relationship while other facts indicate independent contractor status. The determination of the worker's status, then, rests on the weight given to the factors, keeping in mind that no one factor rules. The degree of importance of each factor varies depending on the occupation and the circumstances.

Factors that illustrate whether there is a right to control how a worker performs a task include training and instructions. 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. Initially, the worker received some training and instructions about the job. It is acknowledged that the worker was not provided with daily direct supervision as she worked from her home office. Work done off the premises of the person or persons receiving the services, such as at the worker's home office, indicates some freedom from control. However, this fact by itself did not mean that the worker was not an employee. She remained accountable to the firm through its supervisor. While the worker may have had some flexibility in the hours she worked, she reported her clock-in/out time on the firm's timekeeping system. This was understandable as her salary was based on the hours she worked. In addition, her services were performed on a continuous basis throughout the time period involved. 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.

Factors that illustrate whether there is 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. The worker was paid a base salary plus commission; she had no other economic risk. Her base salary reflected the hours she worked. 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.

Furthermore, the worker had no ability for a profit or loss as she had no significant investment. She worked out of her home and the items she provided, such as a computer, cell phone, vehicle, and internet service, are possessed by many workers whether they are employees or self-employed and would not be considered a capital investment in a business.

Factors that illustrate how the parties perceive 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 are part of the service recipient's regular business activities. There was no written agreement in place. The worker did not hold herself out to the public to perform similar services for others. She did not maintain a place of business or advertise. Her services promoting the firm's product and soliciting orders were not evidence of the worker participating in a separate business venture. Instead, her services were necessary and integral to the firm's on-going business activities. The firm produces dog care products and needed to sell them. 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.

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.

Please see Publication 4341 for guidance and instructions for firm compliance.