

**SS-8 Determination—Determination for Public Inspection**

Occupation 02SAL.119 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 manufacturing chemicals. The worker was engaged as a technical sales representative who sold and serviced specialty and proprietary chemicals to manufacturing concerns, concentrated in the automotive, food, military and industrial industries. He received Form W-2 for his services in 2013 and 2014. The worker believed he should be a statutory employee. There was a written employment agreement provided by the firm.

The worker noted that he had no training or instructions. The firm indicated that it provided [REDACTED] and [REDACTED]. Both parties agreed that the worker's assignments were self-generated based on the needs and demands of new and existing customers. Both agreed that the worker sponsored customer events at his expense. He was completely responsible for soliciting new customers and secured his own leads though the firm added that it also provided leads. Both agreed that all orders were subject to and approved by the firm. Both parties agreed that the worker determined the methods by which the assignments were performed. The firm would be contacted if any problems or issues arose and both parties would resolve. The firm noted that the worker was to submit monthly progress reports, and sales funnel reports. The worker noted that there were no reports. The firm noted that the worker was responsible for his schedule and where he worked. The worker noted that he worked at customers' sites for extended periods of time based on customers' demands; office and administrative work were done at home. Both parties agreed that there were required meetings to attend. Both also agreed that the worker was required to provide the services personally and that the firm would have to approve anyone that the worker hired. The firm noted that it would pay these workers but the worker noted that he would.

The firm provided promotional literature, business cards and a safety kit. The worker provided everything else. The firm did not reimburse the worker for any expenses such as phone, vehicle, travel, entertainment, or supplies. Both parties agreed that the worker was paid commission only with a bimonthly drawing account. Both also indicated that he had no other economic risk other than the loss of his compensation. Both agreed that the customer paid the firm and that the worker established the level of payment for the services provided or products sold. Both also agreed that the firm carried workers' compensation insurance on the worker.

Both the firm and the worker agreed that the firm provided the worker with benefits such as insurance and a 401K. Both parties also agreed that either party could terminate the relationship without incurring a liability. The worker did not perform similar services for others. The work relationship has not ended.

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## Analysis

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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.

Under the circumstances existing in this case, the firm retained the right to exercise, the degree of direction and control necessary to establish an employer-employee relationship under the usual common law rules for Federal employment tax purposes, whether it exercised that right or not. Since the worker was found to be a common law employee, he cannot be a statutory employee. Internal Revenue Code (IRC) section 3121(d)(3)(A) (B)(C)(D) provides, in part, that workers in certain occupational groups who are not employees under the common law, are considered employees for FICA purposes if they received remuneration under certain 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. The firm provided the worker with some training, even if just initially. While it is acknowledged that the worker was given considerable latitude in performing his services, there were occasional meetings to attend and reports to submit. 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. In addition, the worker provided his services 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 commission only and received a bimonthly draw on his commissions. It is acknowledged that worker incurred expenses for which he was not reimbursed but the opportunity for higher earnings or of gain or loss from a commission arrangement is not considered profit or loss.

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. In this case, there was evidence of an employment relationship between the two parties. The firm provided employee-type benefits as well as carried worker's compensation insurance on the worker. In addition, there was a written employment agreement which indicated that anything prepared or received by the worker belonged to the firm. He could not directly or indirectly compete with the firm including up to one year after termination of the work relationship. The agreement also indicated that the employment relationship was exclusive and full-time; the worker was to devote his best efforts in the performance of his job.

The worker was the firm's technical sales representative selling and servicing the firm's products. When doing so, the worker was not engaged in an independent enterprise. He was skilled and experienced in his field; he worked without the firm's direct supervision. However, his services were part of the essential activities of the firm's business operations. 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.