

SS-8 Determination—Determination for Public InspectionOccupation
04FSC.44 OverseerDetermination:
☒ Employee ☐ Contractor

UILC

Third Party Communication:
☒ None ☐ Yes**Facts of Case**

Information provided indicated the firm is a broker for medical equipment companies in the [REDACTED] who want to export their products to [REDACTED] and the [REDACTED]. The firm indicated the worker was a sales representative for the firm for tax years 2013 through August 2015. The worker provided business cards that represented him as Vice President of Sales/[REDACTED]. The firm reported the income on Form 19099-MISC. The worker requested the determination as he felt he was an employee, under the direction and control of the firm.

The firm stated he received minimal training. He was instructed to use his time and money as he wished. The firm did not micromanage his time. He did not require the firm's permission to travel. He was given three to four medical lines to represent; he then determined his own time to contact dealers in the [REDACTED]. The firm stated no weekly or monthly reports were required. The firm stated because he worked in [REDACTED], 12 hours ahead of [REDACTED], he was never aware of his daily routine or schedule. The worker set his own working hours. He was based in [REDACTED], but traveled at his expense in [REDACTED]. They met once per year in [REDACTED] for sales meetings, and spoke by phone/skype. He performed his services personally. The firm lent a laptop computer, he was supposed to have returned it, but did not. He provided his own cell phone, paid for all his travel and entertainment expenses. The firm stated they reimbursed him for nothing and he was paid on a commission basis. The customer paid the firm. The commission rate varied dependent on the product. Either party could terminate the work relationship without incurring a penalty or liability. The firm indicated they had no restrictions on the worker, he was allowed to work for others or teach English or sell art work. He could have represented other products. The firm stated he printed his business cards in [REDACTED]. He was an independent representative of [REDACTED], [REDACTED]. The firm stated the worker stopped communicating with the firm in September of 2015.

The worker stated he received product training and sales training from [REDACTED]. He was instructed to visit all dealers and follow script for dealer meetings listed in [REDACTED]. (Script for Face-to-Face dealer Meetings). The worker stated he received assignments via e-mail and during mandatory weekly phone meetings on Tuesday 9am EST. Personal meetings with [REDACTED] when he was in the proximity. He contacted the firm ([REDACTED]) if there were problems or complaints. He stated he was required to give dealer sales forecast reports for each Dealer and company line. (Examples of these reports were provided). He stated e-mails and conversation details must be recorded in [REDACTED] program, he must report dealers' past/present/future order status, dealers sales status. He indicated he worked from eight am to six pm [REDACTED] with [REDACTED] colleagues, from seven pm to nine pm [REDACTED] with [REDACTED] colleagues. Daily breaks at eleven am and three pm [REDACTED]. He traveled to two countries per month for multiple dealer meetings. He indicated work was performed at a home office 65% of the time, Foreign dealers/customer's location 30% and the [REDACTED] principle office 5% of the time. Dealer meetings were required twice per year, per dealer. There were approximately 30 dealers. [REDACTED] meetings once per week. He was required to perform his services personally. The firm hired and paid all workers. He indicated the firm provided the computer, software, database, training programs, tech support, sample products, dealer incentive awards, work phone account. Product samples provided from [REDACTED] manufacturer to [REDACTED] and passed to the worker. He stated he incurred travel expenses for dealer meetings in [REDACTED] including flights, hotels, transportation and visas. The firm reimbursed for training expenses in the [REDACTED] including flights, hotels, and transportation and expenses to related exhibitions and trade shows. He agreed he was paid on a commission basis. The client paid the firm. He indicated he was given personal days and bonuses. The worker stated if he terminated the work relationship with the firm, the firm seized unpaid commissions to the worker. His final commission was never received. All services were performed under the firm's business name, as Vice President of Sales. The worker indicated he was fired without notification from the firm. All tools, data and software used by the worker were suspended without access. -(A copy of an employment letter from the firm [REDACTED]) that stated he was Vice President of Sales for [REDACTED].)

-A copy of "Exhibit A" Territory Showing the [REDACTED] territories covered, stated "Staff from [REDACTED] will specifically be [REDACTED]" to represent [REDACTED] Medical Products.

- A copy of the Script for Face-to-Face dealer Meetings was provided, this gives instructions on questions to ask, information to get, arrive early, have plenty of business cards on hand etc.

-A copy of the Management by Objectives and Management by Exception- was provided. His #1 objective was to stay in constant contact with his respective Active Dealers. (This will be measured in [REDACTED] and tracked monthly. #2 -to find and stay in contact with, new dealers who may be interested in becoming Active Dealers. Also measured and tracked in [REDACTED]. It stated the firm would review the [REDACTED] database on a monthly basis..as far as the firm is concerned, if it is not recorded in [REDACTED]...it didn't happen.

- A copy of the employment offer for Vice President of Sales in [REDACTED] (This stated the firm would buy him a new laptop and supply with [REDACTED] database and office programs, supply business cards for meetings, pay for his SKYPE calls to customers, meet with him January 2014 for product training and pay him 34% of gross commission earned.

Analysis

Generally, the relationship of employer and employee exists when the person for whom the services are performed has the right to control and direct the individual who performs the services, not only as to what is to be done, but also how it is to be done. It is not necessary that the employer actually direct or control the individual, it is sufficient if he or she has the right to do so.

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. We must examine the relationship of the worker and the business. We consider 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. The degree of importance of each factor varies depending on the occupation and the context in which the services are performed.

Therefore, your 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.

-Training a worker by requiring an experienced employee to work with the worker, by corresponding with the worker, by requiring the worker to attend meetings, or by using other methods, indicates that the person or persons for whom the services are performed want the services performed in a particular method or manner. This is true even if the training was only given once at the beginning of the work 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.

-Control over the place of work is indicated when the person or persons for whom the services are performed have the right to compel the worker to travel a designated route, to canvass a territory within a certain time, or to work at specific places as required.

-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.

We have applied the above law to the information submitted. 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.

Evidence of control generally falls into three categories: behavioral control, financial control, and relationship of the parties, which are collectively referred to as the categories of evidence. In weighing the evidence, careful consideration has been given to the factors outlined below.

Factors that illustrate whether there is a right to control how a worker performs a task include training and instructions. In this case, you retained the right to change the worker's methods and to direct the worker to the extent necessary to protect your financial investment.

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.

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, the worker was not engaged in an independent enterprise, but rather the services performed by the worker were a necessary and integral part of your business. Both parties retained the right to terminate the work relationship at any time without incurring a liability.

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.