

SS-8 Determination—Determination for Public Inspection

Occupation 04MAN.17 Manager	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 submitted a request for a determination of worker status in regard to services performed for the firm from February 2011 to February 2014 as a sales supervisor. Work done included managing other workers, handling all damages and warranties, advertising, troubleshooting issues, making outbound call, answering phones, and data entry. The firm issued the worker Form 1099-MISC for 2011, 2012, and 2013; a copy of the 2014 tax reporting document was not provided to this office. The worker filed Form SS-8 as she was required to work as an employee; however, she was paid as an independent contractor.

The firm's response stated it is an air conditioning sales business. The worker was engaged as an air conditioning sales representative. The worker was hired as an independent contractor and she was paid commission from sales made from 2011 – 2014. It was agreed by both parties the worker would be contracted as an independent contractor.

The firm stated it provided the worker product guides, specifications, and pricing. The worker self-directed the methods by which assignments were performed. Each sales representative is responsible for handling their own customer complaints. The firm required the worker to prepare sales sheets. Meetings were not required. The firm's office is open from 9 am – 6 pm, Monday through Friday. Sales representatives use the office during office hours. Sales representatives contact customers via telephone and use office facilities as needed. The firm required the worker to personally perform services. The worker stated the firm provided her training on products. The firm provided daily work assignments, determined the methods by which assignments were performed, and assumed responsibility for problem resolution. Her daily routine was Monday – Friday, 9 am to 6 pm. The worker had an assigned desk in the sales room next to the warehouse and a set phone extension. The firm required her to attend sales and staff meetings. The firm was responsible for hiring and paying substitutes or helpers.

The firm provided a work station. The worker provided a vehicle. The worker did not lease equipment, space, or a facility. The worker incurred the unreimbursed expense associated with her auto and cell phone. Customers paid the firm. The firm paid the worker commission. The firm guaranteed the worker a minimum weekly amount of pay; a drawing account for advances was not allowed. The firm did not carry workers' compensation insurance on the worker. The worker did not establish the level of payment for the services provided or the products sold. The worker had the ability to negotiate prices for the products sold.

The benefit of bonuses, based on sales, was made available to the worker. The work relationship could be terminated by either party without incurring liability or penalty. There was no agreement prohibiting competition between the parties. The worker did not advertise. The firm stated it represented the worker as a sales representative to its customers. The contracted work was terminated due to a decline in the worker's performance. The worker stated she did not perform similar services for others.

The worker was responsible for making cold calls in soliciting new customers. Leads were provided by a collaboration of advertisement leads and self-generated by the worker. Commission was based on sales. Orders were submitted to and subject to approval by the firm. The worker did not pay for the privilege of serving customers. Products were sold over-the-phone. 40% of the worker's time was spent soliciting. Sales are made to contractors for resale or to end-users.

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.

Section 31.3121(d)-1(a)(3) of the regulations provides that if the relationship of an employer and employee exists, the designation or description of the parties as anything other than that of employer and employee is immaterial. Thus, if an employer-employee relationship exists, any contractual designation of the employee as a partner, coadventurer, agent, or independent contractor must be disregarded.

Therefore, the firm's statement that the worker was an independent contractor pursuant to a verbal 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. Furthermore, whether there is an employment relationship is a question of fact and not subject to negotiation between the parties.

If the services must be rendered personally, presumably the person or persons for whom the services are performed are interested in the methods used to accomplish the work as well as in the results. In this case, the firm required the worker to personally perform services. Furthermore, the services performed by the worker were integral to the firm's business operation. These facts evidence the firm retained the right to direct and control the worker to the extent necessary to ensure satisfactory job performance in a manner acceptable to the firm.

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. In this case, the worker did not invest capital or assume business risks. The term "significant investment" does not include tools, instruments, and clothing commonly provided by employees in their trade; nor does it include education, experience, or training. As the worker likely used her vehicle and cell phone for personal needs, they are not considered a significant business investment. Based on the guaranteed minimum weekly rate of pay or commission rate of pay arrangement, the worker could not realize a profit or incur a 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, 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. Both parties retained the right to terminate the work relationship at any time without incurring a liability. There is no evidence to suggest the worker performed similar services for others as an independent contractor or advertised business services to the general public during the term of this work relationship. The classification of a worker as an independent contractor should not be based primarily on the fact that a worker's services may be used on a temporary, part-time, or as-needed basis. As noted above, common law factors are considered when examining the worker classification issue.

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.