

SS-8 Determination—Determination for Public Inspection

Occupation 04MAN.26 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 firm is in the business of selling health products. The worker was engaged for sales and managed other workers. He received a Form 1099-MISC for his services in 2013 and 2014. There was a signed direct seller agreement.

The worker noted that he received his instructions and work assignments from the owner. The firm indicated that the worker was self-trained and received no work assignments. Each party indicated that the other determined the methods by which the assignments were performed; only the worker indicated that the firm would be contacted if any issues arose. Both parties agreed that there were no reports. The worker noted that he opened/closed the business and worked only at the firm's location; the firm noted that he set his own hours and acknowledged that the worker worked from the firm's location as well as from his home. Only the worker mentioned sales meetings. But both parties agreed that the worker was to provide the services personally.

The worker indicated that the firm provided the facility, workspace, furnishings, equipment, and supplies. The worker noted that he received a base salary plus commission; the firm indicated only a commission. Both parties agreed that the customer paid the firm and that the worker had no other economic risk. Each indicated that the other established the level of payment for services.

Both the firm and the worker agreed that there were no benefits and that either party could terminate the relationship without incurring a liability. The worker did not perform similar services for others.

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. The degree of importance of each factor varies depending on the occupation and the context in which the services are performed.

The firm provided an direct seller agreement signed by the worker. An individual is a direct seller if the following criteria are met:

1. The individual is engaged in the trade or business of selling consumer products to any buyer for resale (by the buyer or any other person) in the home or other than in a permanent retail establishment, or engaged in the trade or business of selling consumer products in the home or other than in a permanent retail establishment;
2. Substantially all of the individual's remuneration for these services is directly related to sales or other output rather than the number of hours worked; and
3. A written contract exists between the individual and the person for whom services are being performed which provides that the individual will not be treated as an employee for federal tax purposes.

However, the worker was a sales manager. 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. It is reasonable to assume that the worker was initially given some instructions and guidelines for the operation. The worker performed his services according to the firm's scheduled work hours and days as well as under the firm's name and at its location. 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.

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. The worker also opened and closed the firm's sales operation. He essentially worked full-time. The term "full-time" may vary with the intent of the parties and the nature of the occupation since it does not necessarily mean working an eight hour day or a five or six day week. If the worker must devote substantially full-time to the business of the person or persons for whom the services are performed, such person or persons have control over the amount of time the worker spends working and, therefore, the worker is restricted from doing other gainful work.

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 received a weekly base pay rate along with commission based on weekly sales generated; he had no other economic risk. The firm provided the workplace, furnishings, equipment, supplies and the personnel for its telemarketing operation. Lack of significant investment by a person in facilities or equipment used in performing services for another indicates dependence on the employer and, accordingly, the existence of an employer-employee relationship. 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.

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 were no benefits and there was a written agreement for a direct seller; however, the worker was a sales manager. 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. In this case, the worker was not engaged in an independent enterprise, but rather the services performed by the worker were part of the necessary activities of the firm's 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.