

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

Occupation 04MAN.58 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**

It is our usual practice in cases of this type to solicit information from both parties involved. Upon the submission of the Form SS-8 from the worker, we requested information from the firm concerning this work relationship. The firm responded to our request for completion of Form SS-8.

From the information provided the firm is a sales organization representing manufacturers of lighting products. The worker was engaged to market and sell of a specific group of products used by the Departments of [REDACTED] and other municipal organizations under a written agreement with the firm. The firm states the worker had autonomy to pursue whatever means he chose to promote the products for which he was responsible. The firm states the worker was not obligated to provide any reporting on his activities and he was paid a commission for products sold. The firm reported the worker's earnings on Forms 1099-MISC.

The firm states they provided no specific training to the worker. The firm states the worker was contracted due to his knowledge of products and purchasers of those products. The firm states the worker did not receive assignments and he was responsible for determining on his own the most effective means to sell the products. The firm states the worker was responsible for resolution of complaints and problems that arose. The worker was not required to submit any reports to the firm but the firm provided the worker with a monthly report reconciling commissions of the current balance due to the worker. The firm states the worker was not required to maintain a particular schedule or hours. The firm states the worker performed services most often at customer's locations 70% of the time, 20% of the time at his home, and 10% of the time at their premises. The firm states the worker was not required to attend meetings and there were no penalties for not attending. The worker was invited to attend a weekly sales meeting which he sometimes did. The worker was required to personally perform his services but the firm states he was free to retain anyone to help him. The firm states the worker was responsible for hiring any substitutes or helpers but he never elected to do so.

The firm provided a desk space, laptop computer, and office materials to the worker in order to perform his services. The worker provided his car, gas, miscellaneous sales items, and entertainment expenses. The firm states literature and samples of merchandise provided by the manufacturers were controlled by the worker. The worker incurred expenses for his vehicle and entertainment. The firm states the worker was mistakenly reimbursed for an airline ticket but no other reimbursement was provided to him. The firm states the customers paid monies to the manufacturers of the purchased products and they received commission payments from the manufacturer. The firm then paid the worker on a commission basis. The worker was guaranteed a set amount per month against commissions. The worker did not have an investment in a business related to services performed and therefore, he could not incur a loss as a result of his services.

The worker was not eligible for benefits. The worker did not perform similar services for others and the worker advertised his services via the firm's business card. Either party could terminate the work relationship at any time without either party incurring a liability upon 60 days written notice.

The firm states the worker determined whether or not to solicit new customers and the worker was responsible for discovering leads. The firm states some leads were provided by the manufacturer of the products. The firm states they are unsure of what percentage of time the worker spent soliciting orders.

---

## Analysis

---

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, the worker was experienced in this line of work and did not require training or detailed instructions from the firm. The need to direct and control a worker and his services should not be confused with the right to direct and control. The worker provided his services on behalf of and under the firm's business name rather than an entity of his own. The firm was responsible for the quality of the work performed by the worker and for the satisfaction of their clients. This gave the firm the right to direct and control the worker and his services in order to protect their financial investment, their business reputation, and their relationship with their clients.

While the firm provided the worker with freedom of action as to when he performed his services, this in and of itself does not determine the worker's status as an independent contractor. The whole relationship needed to be analyzed to determine the worker's correct employment tax status. An important factor of determining a worker's status is who had the contractual relationship with the client and whom did the client pay. In this case, that relationship was between the firm and their clients.

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 provided his own vehicle and incurred fuel expenses for this car, however, this is not considered a significant investment especially since this vehicle was used for other purposes other than for business for the firm. 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. Special scrutiny is required with respect to certain types of facilities, such as home offices.

The worker performed his services for the firm under the firm's business name and not for a business of his own. All commission payments the firm made to the worker were paid to the worker personally and not to a business entity. The worker, therefore, did not have an opportunity to incur a loss or realize a profit. "Profit or loss" implies the use of capital by a person in an independent business of his own. The risk that a worker will not receive payment for his 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.

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.

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, co-adventurer, agent, or independent contractor must be disregarded.

Therefore, the firm's 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.

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.