

SS-8 Determination—Determination for Public Inspection

Occupation 02OFF.209 AdministrativeAssist	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 a commissioned sales agency for various office furniture manufacturers. As the owner of the firm, you engaged the worker as a salesperson. You reported the worker's remuneration on Forms 1099-MISC for 2013, 2014, and 2015.

Both parties submitted a letter dated August 18, 2013 from you to the worker; however, there are differences in the stated pay schedules. Each letter states, among other things, that the agreement is based upon numerous discussions concerning the worker working as a commissioned sales agent. The worker will represent your manufacturers in an ethical and professional manner; she will be asked by customers to provide expertise and assistance in commercial design including space planning, color and finish selections, and product suggestions to your firm's customer base. As an existing designer, the worker's experience and expertise will be used to increase your firm's overall sales in the marketplace. The continued relationship will be contingent on your firm's success as a sales and marketing entity.

The letter you submitted further states that the worker will provide sales representation as an independent agent working on a straight commission basis so that the worker's incentive in working with you will be based on teaming together to develop total sales. Certain manufacturers' lines will be represented together where the commission will be split 30-70, and 50/50 for other named lines; as new lines are picked up, they will be split 30/70. The worker is responsible for expenses for her car, entertainment and lunches, travel, and shows. Special consideration for extraordinary expenses will be agreed upon in advance. Personal expenses, such as health insurance and social security taxes, will be the worker's responsibility as a 1099 agent. In return for the worker's responsibility for the above items, you will advance draws against commissions commensurate with the average sales commissions of your firm. These draws will be equal to the agreed upon amount, paid semi-monthly. Excess earned commissions will be paid on a rolling average of your firm's income. The worker will continue to set her own schedule, and provide her own cell phone, computer, etc. She will own profit and loss for her company, and determine how, what, and where she will conduct her business. The worker can represent companies of her own choosing as long as they do not conflict or compete with the lines your firm is selling. Your firm's continued success and items pertaining to this agreement are dependent upon the nature of the agreement in its entirety. As long as your firm maintains at least \$200,000 in yearly commissions, the same parameters of the agreement will continue.

The letter submitted by the worker further states you gave the worker a choice between two plans for compensation: A guaranteed monthly amount of \$4,000 plus a 5% of commission increase over an average base amount of \$12,000 monthly, payable at the end of the year; or a guaranteed monthly amount of \$3,000 plus 10% of the total monthly commission, payable semi-annually. The parties will work on a split or set amount for the worker's health insurance. You will pay the worker's work expenses, such as gas, show expenses, expenses for travel to customers and factories, etc. You will arrange for a laptop and necessary software at the appropriate time. The worker also enclosed "2014 PLAN [REDACTED]" outlining manufacturers, states, yearly sales, commission bases, and goals, and includes: "[REDACTED] Compensation" A: \$4,000 per month plus 10% of increase of commission; and B: \$3,000 per month plus 10% of total commissions. Further calculations are stated for A & B.

Information submitted by the parties supports that you relied upon the worker's prior training and experience to perform her services. The worker's responsibilities in soliciting new customers were to develop business through new design firm relationships, and new deals with the marketplace. The worker traveled to training sessions and manufacturing facilities. Both parties determined the methods by which the worker performed her services. If problems or complaints occurred, you worked together to resolve them. The worker performed her services in the office, her home, and dealers' locations. She was required to perform her services personally.

You provided the office space. You stated that you purchased a computer for the worker and she paid you back. The worker incurred car expenses, internet and cell phone expenses, and entertainment expenses. You occasionally paid the worker's extraordinary out-of-town expenses. Some manufacturers paid your and the worker's expenses for factory visits. You paid the worker on a commission basis based on your firm's performance, with no guaranteed amount. The worker was allowed a drawing account on a bi-weekly basis commensurate with the rolling average of commissions earned. You did not cover the worker under workers' compensation. Neither party indicated an investment by the worker in your firm or a related business, or the risk of the worker incurring a financial loss beyond the normal loss of compensation.

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Analysis

(Continued)

You did not make benefits available to the worker. Both parties reserved the right to terminate the work relationship without incurring a penalty or liability. You did not prohibit the worker from providing similar services for others during the same time period; but she was required to obtain your approval. There is no evidence presented that the worker advertised her services or maintained a business listing. She used business cards for your firm. You represented the worker as a sales agent. You stated that she provided her services under the various manufacturers' names.

Analysis

Workers in certain occupations will not be treated as employees for FICA, FUTA, or federal income tax withholding purposes provided they meet certain qualifications. These workers are referred to as "statutory non-employees." IRC 3508(b)(2) provides that, for all IRC purposes, direct sellers are statutory non-employees if the following qualifications are met:

- a. The worker is engaged in the sale of consumer products in the home or in other than a permanent retail establishment; engaged in delivering or distribution of newspapers; or engaged in sale of consumer products for resale in the home or in other than a permanent retail establishment.
- b. Substantially all of such worker's remuneration for services is directly related to sales or other output rather than to the number of hours worked.
- c. A written contract exists between the worker and the taxpayer for which services are being performed that provides that the worker will not be treated as an employee for federal tax purposes.

As there is no evidence of a written contract between the parties, the worker does not qualify under IRC 3508.

Factors that illustrate whether there was a right to control how a worker performed a task include training and instructions. In this case, you relied upon the worker's prior training and experience to perform her services. 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. You must have retained the right to change the worker's methods and to direct the worker to the extent necessary to protect your financial investment. At times, the worker provided services from her home or at dealerships' locations. Work done off the premises of the person or persons receiving the services, such as at the office of the worker, indicates some freedom from control. However, this fact by itself does not mean that the worker is not an employee. The worker was required to perform her services personally, meaning she could not engage and pay others to perform services for you on her behalf. 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. These facts show that you retained behavioral control over the services of the worker.

Factors that illustrate whether there was 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. "Profit or loss" implies the use of capital by a person in an independent business of his or her own. There is no evidence to suggest the worker's computer and phone were purchased exclusively for business purposes. Presumably these items were also used by the worker for her personal needs. Therefore, they are not considered a significant business investment. You paid the worker on a commission basis. The opportunity for higher earnings or of gain or loss from a commission arrangement is not considered profit or loss. You afforded the worker with the opportunity to draw against future commissions. In such instances, a firm assumes the hazard that the services of the worker will be proportionate to the regular payments. This action warrants the assumption that, to protect its investment, a firm has the right to direct and control the performance of the worker. These facts show that you retained control over the financial aspects of the worker's services.

Factors that illustrate how the parties perceived 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 were part of the service recipient's regular business activities. In this case, the worker performed her services on a continuing basis. She was not engaged in an independent enterprise, but rather the sales services performed by the worker were a necessary and integral part of your commission sales business. 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 business. The worker could have provided similar services for others during the same time period; however, it is possible for a person to work for a number of people or firms concurrently and be an employee of one or all of them. Although you did not provide benefits to the worker, neither party incurred a liability when the work relationship terminated, a factor indicating an employer-employee relationship. These facts show that you retained control over the work relationship and services of the worker.

Based on the above analysis, we conclude that you 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.