

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

|                                |   |
|--------------------------------|---|
| Occupation<br>04MAN.55 Manager | Determination:<br><input checked="" type="checkbox"/> Employee <input type="checkbox"/> Contractor  |
| UILC                           | Third Party Communication:<br><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 an on-line membership interior design community and the worker was engaged under a written agreement to perform services as a sales and marketing director. The worker's duties included soliciting memberships on the firm's website. The firm states the worker was an independent contractor (IC) because they provided no training to the worker, the worker made her own schedule, and compensation paid to the worker was based upon results of the worker soliciting new membership accounts.

The firm states the worker's assignments were generated through her own efforts and the worker's routine consisted of contacting prospective members. The firm states the worker determined how she performed her services and she was responsible for the resolution to any problems or complaints that occurred. The firm states the worker personally performed her services at her home 20% of the time, at their office 20% of the time, and at prospective client locations 60% of the time. The worker was required to submit mileage reports to the firm. The worker attended weekly one hour meetings and the firm states there was no penalty to the worker for not attending.

The firm states they provided the website, computer access to their database, and their marketing materials such as pens, paper, and signs to the worker in order to perform her services. The firm states the worker provided her home internet connection, a cell phone, a vehicle, a home computer, and briefcase and she also incurred expenses for a vehicle, fuel for her vehicle, insurance, parking fees, tolls, and meals. The firm reimbursed the worker for mileage expenses. The firm paid the worker a base salary plus commissions. The firm reported the worker's earnings on Forms 1099-MISC. The firm states the worker could incur a loss due to theft and/or destruction of her cell phone or vehicle.

The worker was not eligible for employee benefits. The firm states the worker performed similar services for others and she was not required to seek their approval to do so. For a period of one year after termination of the worker's services, the worker was not to solicit, divert or take away any of the firm's customers nor engage in competitive on-line publication activities. The worker advertised her services via the firm's business cards and the worker performed her services under the firm's business name. Either party could terminate the work relationship at any time without either party incurring a liability. The worker terminated the work relationship.

---

## 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 her services should not be confused with the right to direct and control. The worker provided her services on behalf of and under the firm's business name rather than an entity of her 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 her 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.

While the worker provided her own internet service and home computer, this is not considered a significant investment. 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.

There was no evidence presented or found in this investigation that the worker had an investment in a business related to services performed and therefore, did not have an opportunity to incur a loss or realize a profit as a result of her services. "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.

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.