

# SS-8 Determination—Determination for Public Inspection

Occupation 02SAL.121 Salesperson	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 corporation operating a marketing agency. The firm engaged the worker as a salesperson. The two parties entered into a [REDACTED] that was signed by both parties.

The firm stated they hire another party to keep track of each rep, their commissions due and progress. The worker had an assistant that the firm pays \$50,000/yr. The worker relies upon his experience for his assignments and how to perform those assignments. The firm stated the worker relies upon the firm to resolve his problems and complaints and the worker stated he relies upon himself. The firm stated the worker is required to hit monthly sales target and to keep certain [REDACTED] on each order. The worker sets his own schedule but his assistant is required to perform services for 40 hrs./week. The worker's location is split up between the firm's place of business and away from the office. The firm stated there are quarterly sales rep meetings that all salespersons are required to attend. The worker was required to perform his services personally.

The firm stated they provided the worker with a laptop, secure office, kitchen, art department, office furniture, all freight carriers, courier services and a golf membership. The worker does not lease space to perform his services. The worker incurs travel costs to clients. The worker stated and the firm confirmed the worker requested to split the costs of some of the supplies. The firm stated they do reimburse the worker for business expenses i.e. travel, hotel, food for shows and any expenses related to a service need by the firm. The worker is paid on commission. The firm stated they provide the worker with a \$10,000 draw every two weeks. The worker is allowed a drawing account.

The firm stated they offer the worker a pension plan. Either party can terminate the relationship without incurring a liability. The firm stated the worker did not perform similar services for others and the worker stated that he did and didn't. The worker is represented as a [REDACTED] rep. The worker relationship was still ongoing at the time the Form SS-8 was filed.

The firm provided a copy of a confidential agreement signed by both the firm and worker. There was a clause stating the worker would not use any of the information provided by the firm for 3 yrs. after the relationship ended. The worker would not encourage, solicit, or recruit any firm's employees to leave their employment.

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## Analysis

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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.

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. In the instant case the worker does sell the firm's product under the firm's business name.

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. The firm does require the worker to perform his services personally which shows the firm is interested in the methods used as well as the end result.

If the person or persons for whom the services are performed ordinarily pay the worker's business and/or traveling expenses, the worker is ordinarily an employee. An employer, to be able to control expenses, generally retains the right to regulate and direct the worker's business activities. The firm stated they do reimburse the worker business expenses as an employee.

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. The firm has the significant investment in providing this service to their customers.

Payment by the hour, week, or month generally points to an employer-employee relationship, provided that this method of payment is not just a convenient way of paying a lump sum agreed upon as the cost of a job. In such instances, the 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, the firm has the right to direct and control the performance of the workers. Also, workers are assumed to be employees if they are guaranteed a minimum salary or are given a drawing account of a specified amount that need not be repaid when it exceeds earnings. In the instant case the worker is given a bi-weekly draw as an employee.

The worker is an employee according to common law. The information provided by both parties showed the firm is treating the worker correctly. The worker is an experienced salesperson and did not require constant supervision. The worker is qualified in this profession to perform his services according to his past experience which is a common practice in this industry. The fact the worker is required to perform his services personally demonstrates an employer-employee relationship exists. The firm's provides the worker with an assistant which indicates an employer-employee relationship. The firm provides the worker with an office, office equipment, etc. which demonstrates an employer-employee relationship exists. The fact the worker can rely upon the firm to give him a draw bi-weekly demonstrates an employer-employee relationship exists. An employer-employee relationship exists since the firm does offer the worker a pension plan. The worker sells under the firm's business name which demonstrates an employer-employee relationship exists.

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.

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