IRS PRIVATE LETTER RULING FOR

AMERICAN FAMILY INSURANCE

Private Letter Ruling

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This is in response to the request for a ruling we received from the above named worker and others, to determine their employment tax status with regard to services they performed for your client, the above named firm, as insurance agents.

As is our usual procedure in cases of this type, information was requested from the firm concerning its view of the workers' relationship with the firm. Although the firm did not submit Form SS-8, Determination of Employee Work Status for Purposes of Federal Employment Taxes and Income Tax Withholding, the information we requested was provided by the firm.

According to the information we received, the firm is in the business of selling various types of insurance and financial products to businesses and private individuals; and the workers were engaged as agents to sell the firm's products. When the workers were initially hired, they were considered to be "trainees" for a period of at least 24 months. The status of the workers during the training period is not at issue in this ruling however. This ruling applies to the time period after the training was completed when the workers became "career agents" or "agents".

The workers performed their services under a written agreement with the firm. The contract originally written in 1963 was amended in 1970 and again in 1983. The firm stated that it currently has agents performing services under all three versions of the contract. While there were a number of amendments to the original contract, it appears that all the workers perform their services for the firm under similar circumstances and that the amendments do not affect the employment tax status of the workers.

After the workers completed their initial training period, they did not receive any formal training from the firm. However, the workers were provided with promotional materials, educational and training courses, and at the firm's discretion, may have been assisted by a district manager. While the workers state that they were required to attend meetings and seminars at which they received training and instructions as to how to

perform their services, the firm states that attendance at such meetings was optional and that the workers were not required to follow any instructions given by the firm.

The workers were engaged for an indefinite period. They were not required to follow a routine or schedule established by the firm, however, several agents received letters from their district manager directing them to give him at least thirty days written notice whenever they intended to take a vacation or be out of the district for any reason other than business. In addition, they were required to submit monthly sales reports to the firm. The workers performed their services in their place of business, which they either owned or rented from an unrelated party. The workers provided all their own office furniture, office equipment, materials and supplies. The firm provided agents with forms and some stationary products. The workers incurred expenses for rent, utilities, office supplies, computer lease, auto expenses, and travel expenses. It was understood that they would perform their services personally. They also incurred expenses for salary payments to clerical and other staff members they engaged to assist them in the performance of their services for the firm.

The workers were paid on a commission basis and were not allowed advances against future earnings. They were eligible for bonuses based on their sales but were not eligible for paid vacation days, paid sick days, or other benefits. The firm did not deduct income tax or social security taxes from their pay. The workers were issued Form 1099. The workers performed their services for the firm on a full-time basis and did not perform similar services for others.

The firm retained the right to discharge the workers and the workers retained the right to terminate their relationship with the firm at any time. The workers performed their services under their own business name and under the firm's name. The workers advertised in the local telephone directory using their name and the firm's logo. A portion of the advertising expenses were paid by the firm.

The workers had a financial investment in a business related to the performance of their services for the firm, in that, they paid all the costs associated with operating and maintaining an office including rent, utilities, furnishings, office equipment, materials, and supplies, and were obligated to pay the wages of anyone they hired to assist them in the performance of their services for the firm. Accordingly, the workers assumed the risk of realizing a profit or incurring a loss in connection with the services they perform.

Section 3121(d)(2) of the Internal Revenue Code provides that the term "employee" means any individual who, under the usual common law rules applicable in determining the employer-employee relationship, has the status of employee.

The question of whether an individual is an independent contractor or an employee is one of fact to be determined upon consideration of the facts and the application of the law and regulations in a particular case. Guides for determining the existence of that status are found in three substantially similar sections of the Employment Tax Regulations; namely, sections 31.3121(d)-1, 31.3306(i)-1, and 31.3401(c)-1 relating to the Federal

Insurance Contributions Act (FICA), the Federal Unemployment Tax Act (FUTA), and federal income tax withholding, respectively.

Section 31.3121(d)-1(c)(2) of the regulations provides that generally, the relationship of employer and employee exists when the person for whom the services are performed has the right to control and direct the individual who performs the services not only as to the results to be accomplished by the work, but also as to the details and means by which the result is accomplished. That is, an employee is subject to the will and control of the employer not only as to what shall be done, but also as to how it shall be done. In this connection, it is not necessary that the employer actually direct or control the manner in which services are performed; it is sufficient if he or she has the right to do so. The right to discharge is also an important factor indicating that the person possessing that right is the employer. Other factors characteristic of an employer, but not necessarily present in every case, bare the furnishing of tools and the furnishing of a place to work to the individual who performs the services. In general, if an individual is subject to the control or direction of another merely as to the result to be accomplished and not as to the means and methods for accomplishing the result, he is an independent contractor.

In determining whether an individual is an employee under the common law rules, factors have been identified as indicating whether sufficient control is present to establish an employer-employee relationship. The factors have been developed based on an examination of cases and rulings considering whether an individual is an employee. The degree of importance of each factor varies depending on the occupation and the factual context in which services are performed. See Rev. Rul. 87-41, 1987-1 C.B. 296.

Consideration must also be given to such factors as the continuity of the relationship and whether or not the individual's services are an integral part of the business of the employer as distinguished from an independent trade or business of the individual himself in which he assumes the risk of realizing a profit or suffering a loss. See United States v. Silk , 331 U.S. 704 (1947), 1947-2 C.B. 167 and Bartels v. Birmingham , 332 U.S. 126 (1947), 1947-2 C.B. 174.

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 such relationship exists, it is of no consequence that the employee is designated as a partner, coadventurer, agent, independent contractor, or the like.

Applying the common law to the facts in this case, if the person or persons for whom the services are performed hire, supervise, and pay assistants, that factor generally shows control over the workers on the job. However, if one worker hires, supervises, and pays assistants pursuant to a contract under which the worker is responsible only for the attainment of a result, that factor indicates an independent contractor status. Accordingly, the fact that the worker in this case hired, supervised, and paid anyone he needed to assist him in performing his services for the firm indicates that the worker was an independent contractor. Compare Rev. Rul. 63-115, 1963-1 C.B. 178 with Rev. Rul. 55-593, 1955-2

C.B. 610.

The establishment of set hours of work by the person or persons for whom the services are performed is another factor indicating control. In this case, however, the worker was free to establish his own working hours and was not required to follow a routine or schedule established by the firm. This fact tends to indicate that the worker was an independent contractor. See Rev. Rul. 73-591, 1973-2 C.B. 337

If the work is performed on the premises of the person or persons for whom the services are performed, that factor suggests control over the worker. Conversely, work done off the premises of the person or persons receiving the services indicates some freedom from control and, accordingly, the existence of an independent contractor relationship. Because the worker in this case performed his services at his own place of business rather than at the firm's place of business, an independent contractor relationship is indicated. See Rev. Rul. 56-694, 1956-2 C.B. 694.

If a worker must perform services in the order or sequence set by the person or persons for whom the services are performed, that factor shows that the worker is not free to follow his or her own pattern of work but must follow the established routines and schedules of the person or persons for whom the services are performed. The worker in this case was not required to follow a routine or schedule set by the firm, but was free to perform his services in the manner in which he saw fit, free from control by the firm. Accordingly, an independent contractor relationship is indicated. See Rev. Rul. 56-694.

Another factor to consider is the method of remuneration. While payment by the hour, week, or month generally indicates an employment relationship, payment by the job or on a commission basis, as in this case, tends to point towards an independent contractor relationship. See Rev. Rul. 74-389, 1974-2 C.B. 330.

If the person or persons for whom the services are performed ordinarily pay the worker's business 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. In this case, however, the worker was responsible for paying his own business expenses, indicating that the worker was an independent contractor rather than an employee of the firm. See Rev. Rul. 55-144, 1955-1 C.B. 483.

The fact that the person or persons for whom the services are performed furnish significant tools, materials, and equipment tends to show the existence of an employer-employee relationship. Although the firm in this case did provide the worker with some forms, manuals, advertising materials, and other materials, the significant amount of tools, materials, and equipment were provided by the worker. Thus, an independent contractor relationship is indicated. See Rev. Rul. 71-524, 1971-2 C.B. 346.

If the worker invests in facilities that are used by the worker in performing services and are not typically maintained by employees, such as the maintenance of an office rented at fair value from an unrelated party, that factor tends to indicate that the worker is

an independent contractor. Because the worker in this case did have a significant investment in facilities used in the performance of his services, an independent contractor relationship is indicated. See Rev. Rul. 71-524.

A worker who can realize a profit or incur a loss as a result of his or her services is generally an independent contractor, but the worker who cannot is an employee. For example, if the worker is subject to a real risk of economic loss due to significant investments or a bona fide liability for expenses, such as salary payments to employees, that factor indicates that the worker is an independent contractor. Accordingly, because the worker in this case could realize a profit or incur a loss as a result of his services, an independent contractor relationship is indicated. See Rev. Rul. 70-309, 1970-1 C.B. 199.

Accordingly, in applying the law, regulations, and principles set forth in the revenue rulings, we conclude that the worker in this case was an independent contractor and was not an employee of the firm for purposes of FICA, FUTA, and federal income tax withholding. In addition, we conclude that the remuneration received by the worker constituted "net earnings from self-employment" for purposes of the tax imposed under the Self-Employment Contributions Act (SECA).

This ruling applies to all workers who perform similar services under similar circumstances for the firm. It is directed only to the taxpayer to whom it is addressed. Under section 6110(j)(3) of the Code this ruling may not be used or cited as precedent.

A copy of this ruling is being furnished to the District Director's office in *****.

Sincerely yours, Ronald L. Moore, Technical Assistant, Office of the Associate Chief Counsel (Employee Benefits and Exempt Organizations)