

# SS-8 Determination—Determination for Public Inspection

Occupation 02SAL.62 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

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The worker initiated the request for a determination of her work status as a makeup artist/sales assistant in tax year 2014 to the present (March 2016). She had been an employee (W-2) but when she changed her hours to return to school the firm converted her to a 'freelancer'. Her job was to sell makeup, assist client in purchases and trying out makeup, count the register, take out the trash, and mop the floor. There were no significant changes to her job and the duties she performed. The firm's business is described as a retail store where makeup is sold and services such as makeovers and consultations are provided.

The firm's response was signed by ██████████, ████████ director. The firm's business is described as retail cosmetics and beauty products. The worker performed services as a makeup artist, beauty advisor, and sales assistant. The worker had been a full time employee for more than 4 years till her availability became very limited because she went to school. She was represented to the customer as a makeup artist or sales assistant. The worker was issued Form W-2 until November 2014; she was issued Form 1099-MISC until the work relationship ceased.

According to the firm, the worker was trained in product knowledge, hygiene, product application, and dress code. The worker's job assignments came from the firm's management. The methods by which the worker performed her services were determined by the firm. If the worker encountered any problems or complaints that required resolution she was to notify the firm. The worker performed the services at the firm's location. The firm indicated the worker was not required to attend meetings and was not required to perform the services personally.

The firm provided makeup brushes, beauty accessories, and testers; the worker provide nothing. The worker was reimbursed for all travel expenses including meal allowance and mileage if business travel was warranted. The firm paid the worker an hourly wage; the customers paid the firm. The firm acknowledged that the firm carried workers' compensation insurance on the worker. The worker was not at risk for a financial loss in this work relationship. The firm established the level of payment for services rendered and products sold.

The firm stated the benefits extended to the worker were paid vacations and bi-monthly product gratis; the worker stated she was given bonuses. Either party could terminate the work relationship without incurring a liability or penalty. Both parties concurred the worker was not performing same or similar services for others during the same time frame. The firm responded that the firm represented the worker as a makeup artist or sales assistant.

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## Analysis

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A worker who is required to comply with another person's instructions about when, where, and how he or she is to work is ordinarily an employee. This control factor is present if the person or persons for whom the services are performed have the right to require compliance with instructions. 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.

A continuing relationship between the worker and the person or persons for whom the services are performed indicates that an employer-employee relationship exists. A continuing relationship may exist where work is performed in frequently recurring although irregular intervals.

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.

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.

There were no changes to the worker's duties or work relationship. The firm had clearly treated the worker as an employee and then decided to discontinue withholding between November 2014 to the end of the work relationship.

We have considered the information provided by both parties and have applied the above law to this work relationship. In this case, the firm retained the right to change the worker's methods and to direct the worker to the extent necessary to protect its financial investment and business reputation and to ensure its customers' satisfaction. The worker was not operating a separate and distinct business; 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. 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 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.

## CONCLUSION

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.