

SS-8 Determination—Determination for Public Inspection

Occupation 04MAN.37 Manager	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 in business as a tanning salon. The worker was engaged by the firm to provide tanning and related services, and to promote the firm's services and products. The firm reported the worker's remuneration on Forms 1099-MISC for 2012, 2013, and 2014.

Information from the parties supports that at the beginning of the worker relationship, the firm trained the worker on its computer system and pricing. The worker chose her daily tasks and what days to work, and determined the methods by which she performed her services. She was responsible for resolving any problems or complaints that may have occurred. The worker was required to report daily sales. She coordinated her schedule with other workers. The worker performed her services on the firm's premises, from other locations, and from her home or car. The worker was required to perform her services personally. If additional personnel were needed, the firm was responsible for hiring and compensating them.

The firm provided the salon, computer, property, and tanning equipment. The worker utilized her vehicle and computer, and provided her own clothes, fans, and chairs. The worker did not lease space or equipment. Other than transportation costs, she did not incur expenses in the performance of her services. The firm paid the worker on a salary, commission, and hourly rate basis. It guaranteed the worker a percentage commission. The worker was not allowed a drawing account for advances. Customers paid the firm directly. Neither party indicated an investment by the worker in the firm or a related business, or the risk of the worker incurring a financial loss beyond the normal loss of compensation.

The firm did not make benefits available to the worker. The worker did not provide similar services for others during the same time period. Any solicitation by the worker was for the benefit of the firm. The worker terminated the work relationship without incurring a liability or penalty.

Analysis

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, coadventurer, 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. If a firm has to make a worker "understand" or even if a worker "agreed to" being an independent contractor (as in a verbal or written agreement), this factor does not determine the worker's status as an independent contractor. An individual knows they are in business for themselves offering their services to the public and does not need to be made aware of, understand, or agree to be an independent contractor.

Factors that illustrate whether there was a right to control how a worker performed a task include training and instructions. In this case, the firm trained the worker. It is only reasonable to assume that the firm was responsible for resolving any problems that were beyond the worker's capacity to resolve. It must have retained the right to change the worker's methods and to direct the worker to the extent necessary to protect its financial investment and ensure its customers' satisfaction. Training a worker indicates that the person or persons for whom the services are performed want the services performed in a particular method or manner. This is true even if the training was only given once at the beginning of the work relationship. The worker provided services on the firm's premises and other 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 the firm 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 the firm 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. Lack of significant investment by a person in facilities or equipment used in performing services for another indicates dependence on the employer and, accordingly, the existence of an employer-employee relationship. The firm paid the worker at a set rate, plus commissions. The opportunity for higher earnings or of gain or loss from a commission arrangement is not considered profit or loss. These facts show that the firm 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 performed her services under the firm's name. The worker was not engaged in an independent enterprise, but rather the tanning and sales services performed by the worker were a necessary and integral part of the firm's tanning salon 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 owner of the business. Although the firm did not provide benefits to the worker, the worker terminated the work relationship without incurring a liability. If the worker has the right to end his or her relationship with the person for whom the services are performed at any time he or she wishes without incurring liability, that factor indicates an employer-employee relationship. These facts show that the firm retained control over the work relationship and services of the worker.

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.