

SS-8 Determination—Determination for Public Inspection

Occupation 05PCP Personal Care Providers	Determination: <input checked="" type="checkbox"/> Employee <input type="checkbox"/> Contractor
UILC	Third Party Communication: <input checked="" type="checkbox"/> None <input type="checkbox"/> Yes

I have read Notice 441 and am requesting:

- Additional redactions based on categories listed in section entitled "Deletions We May Have Made to Your Original Determination Letter"
- Delay based on an on-going transaction
- 90 day delay

For IRS Use Only:

Facts of Case

The firm is in the business of operating a hair salon. The worker was initially engaged as an apprentice working under a stylist. She received a Form W-2 for her services in 2014 and 2015. Then during 2015, she became a stylist for the salon and received a Form 1099-MISC for those services. The firm provided a blank written agreement that was unsigned and undated.

Both the firm and the worker indicated that training was provided but the firm noted that it was only during the apprenticeship period. The worker received her work assignments via appointments scheduled by the firm's receptionist. Each party indicated that the other determined the methods by which the appointments were performed; but that the firm would be contacted if any issues or problems arose. There were no reports. The worker noted that her work routine was dependent on the shop's open hours as she worked at the firm's location. The firm noted that the worker controlled her appointments via phone or text; she could accept or decline walk-ins. There were no meetings. Both parties agreed that the worker was required to personally provide the services; only the worker noted that the firm would hire/pay any substitute workers.

Both the firm and the worker agreed that the firm provided the stylist station, hair products, towels, etc. and that the worker provided the tools of her trade such as scissors, combs, blow dryer, brushes, etc. The worker incurred expenses for her tools; the firm noted that she had to pay service charge fees for color and shampoo/conditioner. Both parties agreed that the worker was paid a commission; the worker added an hourly rate as well. Both indicated that she had no other economic risk and that the customer paid the firm. Both parties agreed that the worker did not establish the level of payment for services; the firm noted that the worker could negotiate prices with the customer. However, the firm's website had services and prices posted.

Both the firm and the worker agreed that there were no benefits and that either party could terminate the relationship without incurring a liability. The worker did not provide similar services for others though the firm did not know. The worker indicated that there was a non-compete clause. Both agreed that the worker was not responsible for soliciting customers. The firm provided business cards. The relationship ended when the worker quit.

Analysis

In determining whether an individual is an employee or an independent contractor under the common law, all evidence of both control and lack of control or independence must be considered. The relationship of the worker and the business must be examined. Facts that show a right to direct or control how the worker performs the specific tasks for which he or she is hired, who controls the financial aspects of the worker's activities, and how the parties perceive their relationship should be considered. 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.

There are significant similarities between this case and Revenue Ruling 73-591, 1973-2, C. B. 337. In that ruled case, it was determined that a beautician who 'leased' space in a salon, was required to work specific hours, furnished daily reports to the owner regarding her receipts for the day and paid for her own licensing was an employee. The salon furnished, repaired and maintained all the equipment materials and supplies. For her services the beautician received a set percentage of the money taken in by her. She was required to be at her chair at a specified time on those days that she came into work and to perform the services requested by the customers. The beautician furnished a daily report of her receipts on which her pay was calculated. Compare the above ruling to Revenue Ruling 73-592 1973-2 C.B. 338 that determined a beautician who rented a booth in a beauty salon for a fixed monthly fee, sold and styled wigs she purchased herself, retained the proceeds with no guaranteed minimum amount, selected her own customers, set her own schedule, adhered to shop rules, and maintained her own tools was engaged in a trade or business.

In this instant case, there are similarities with Rev. Ruling 73-591. The worker received a percentage of her receipts, guaranteeing her a minimum of any receipt. The worker did not pay a set rental fee. While her hours may have been flexible, her services were performed during the salon's open hours and fees charged were posted by the salon.

Factors that illustrate whether there is a right to control how a worker performs a task include training and instructions. 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. This worker was initially trained by the firm. She was scheduled to work during the firm's open hours, even if her hours were flexible and based on her availability. If the nature of the occupation makes fixed hours impractical, a requirement that workers be on the job at certain times is an element of control. She was to provide the services personally. 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. This was understandable, as the firm had trained her and the salon's reputation was directly impacted by the worker's services. In addition, the worker provided her services on a continuous basis throughout the time period involved. 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.

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. It was the firm that had the investment in the salon, equipment, and supplies. The worker was guaranteed a percentage of commission for her services and had no other economic risk. 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 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.

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. There were no benefits. While there was a written agreement provided, it was not signed or dated by both parties. The worker was engaged as a hair stylist performing services for the firm's salon. When doing so, the worker was not engaged in an separate business enterprise. While the worker's services may have evolved from those she provided initially, there was no evidence to indicate she was operating her own business. Her services instead were essential to the firm's continuing operations. 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.

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.

Please see Publication 4341 for guidance and instructions for firm compliance.