

SS-8 Determination—Determination for Public Inspection

Occupation 05PCP Personal Service 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 nail salon. The worker was engaged as a nail technician. She received a Form 1099-MISC in 2013 through 2017. There was a written agreement signed by the worker at the end of 2012.

The firm indicated that it provided no training with the worker indicating that some instructions were provided for each type of service offered by the firm. The worker added that the firm specified which worker would provide a specific service. The worker received her work assignments by appointments and on a rotation basis for walk-ins. Both parties agreed that the firm determined the methods by which the assignments were performed and would be contacted if any problems or issues arose. The firm indicated that there were daily reports of customer totals and that the worker had a fluctuating schedule set by the worker. The worker, however, indicated that she worked six days a week, all day, completing each service as delegated by the firm; she maintained the cleanliness of the salon as well. Both parties agreed that the worker worked at the firm's location. Only the worker mentioned meetings. Both also agreed that the worker was to provide the services personally.

According to the worker, the firm provided all products, equipment, supplies, wax, lotions and implements. The firm disagreed indicating that they provided nothing and that the worker purchased her own equipment. The firm also indicated that the worker leased the desk and workstation space, effectively paying by a commission split between the parties. Both parties agreed that the customer paid the firm and that the firm established the level of payment for services.

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 perform similar services for others and agreed to work only for the firm. The firm noted that the worker had business cards. The worker noted that the firm solicited new business and that she was responsible for maintaining a good relationship with the customer. 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 the 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.

In contrast, consider Revenue Ruling 73-592 1973-2 C.B. 338 which determined that 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 firm is a nail salon with the worker providing manicures and pedicures. This firm also provided the workplace and workspace. There was also no set lease amount as the amount was a percentage of the worker's receipts for services. The customers paid into the firm's 'common cash drawer' for the worker's services with the firm using the worker's weekly receipts/daily reports to calculate her pay. 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. The customers called the firm to schedule appointments and could also be serviced by walking-in to the firm's 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. The worker's work schedule might have been flexible, and based on her availability. Usually the establishment of set hours of work by the person or persons for whom the services are performed is a factor indicating control; however, 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. This would be the case when appointments were scheduled for the worker as the worker would be required to adhere to the scheduled appointment times.

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. This worker had no significant investment. 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. 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.

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 and there was a written agreement. The firm's belief 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.

The worker was engaged as a nail technician for the firm's nail salon. When doing so, the worker was not engaged in a separate business venture. 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.