

# SS-8 Determination—Determination for Public Inspection

Occupation

05PCP Hair Stylist

Determination:

☒ Employee

☐ Contractor

UILC

Third Party Communication:

☒ None

☐ 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

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## Facts of Case

It is our usual practice in cases of this type to solicit information from both parties involved. Upon the submission of the Form SS-8 from the worker, we requested information from the firm concerning this work relationship. The firm responded to our request for completion of Form SS-8.

From the information provided the firm is in business to provide hair services to clients. The worker was engaged from May 2013 to January 2018 to perform hair stylist services. The firm believes the worker was an independent contractor while performing services for them because she performed work to her clients in her own personal matter, she gave advice, and set her own prices. The firm reported the worker's earnings on Forms 1099-MISC.

The firm states they provide cosmetology classes to the worker twice a year. The worker's assignments were determined by client appointments and the firm states the worker decided what was best for the client. The worker was required to personally perform her services at the firm's premises. The firm states the worker would patiently wait for walk-ins and appointments but could leave their salon if any plans came up. The salon hours are Tuesday through Saturday from 10 a.m. to 6 p.m. and the firm states the worker was welcome to stay for any walk-ins or appointment made on the schedule. The firm states the worker was not required to attend meetings but they would touch base with her every once in a while.

The firm states they provided color supplies, nail supplies, and waxing supplies to the worker in order to perform her services. The worker provided combs, blow dryers, clippers, and capes. The worker was compensated on a commission basis and the clients paid the firm for the services rendered by the worker. The firm states the worker established the level of payment for the services provided.

The worker did not perform similar services for others and the firm states the worker advertised her services on social media providing her own business cards. The firm states the worker usually took pictures of her work for her social media page. The firm states the worker performed her services under her own name and was represented as someone who works with their hair studio. Either party could terminate the work relationship at any time without either party incurring a liability. The worker terminated the work relationship.

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## Analysis

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As in this case and 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.

Evidence of control generally falls into three categories: behavioral control, financial control, and relationship of the parties, which are collectively referred to as the categories of evidence. In weighing the evidence, careful consideration has been given to the factors outlined below.

Section 31.3401(c)-1(c) of the regulations states that generally professionals such as physicians, lawyers, dentists, veterinarians, contractors, subcontractors, public stenographers, auctioneers, and others in an independent business or profession in which they offer their services to the public are not employees. However, if a firm has the right to direct and control a professional, he or she is an employee with respect to the services performed under these circumstances.

Often the skill level or location of work of a highly trained professional makes it difficult or impossible for the firm to directly supervise the services so the control over the worker by the firm is more general. Factors such as integration into the firm's organization, the nature of the relationship and the method of pay, and the authority of the firm to require compliance with its policies are the controlling factors. Yet despite this absence of direct control, it cannot be doubted that many professionals are employees.

Factors that illustrate whether there is a right to control how a worker performs a task include training and instructions. In this case, the worker was experienced in this line of work and did not require training or detailed instructions from the firm. The need to direct and control a worker and her services should not be confused with the right to direct and control. The worker provided her services on behalf of and under the firm's business name rather than an entity of her own. The clients paid the firm for services rendered by the worker and the firm paid the worker a percentage of the income taken in; therefore, the client relationship was between the firm and the client not the worker and the client. A client may prefer a particular stylist; however, the client belongs to the one who is paid by the client. The firm was responsible for the quality of the work performed by the worker and for the satisfaction of their clients. This gave the firm the right to direct and control the worker and his services in order to protect their financial investment, their business reputation, and their relationship with their clients.

While the firm provided the worker with freedom of action as to when she performed her services, this in and of itself does not determine the worker's status as an independent contractor. The whole relationship needed to be analyzed to determine the worker's correct employment tax status. An important factor of determining a worker's status is who had the contractual relationship with the client and whom did the client pay. In this case, that relationship was between the firm and their clients.

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.

The worker provided her own work tools however, this is not considered a 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.

The worker in this case did not lease a space at the firm's premises. When there is a formal and valid lease agreement and the worker must pay a rental fee whether she works or collects fees or not, an opportunity to incur a loss is present. That did not happen in this case. "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.

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. 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. Both parties retained the right to terminate the work relationship at any time without incurring a liability.

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.