

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 a salon and spa. As the owner of the firm, you engaged the worker as a stylist. You reported the worker's remuneration on Forms 1099-MISC for 2016 and 2017.

Information from the parties supports that you relied upon the worker's prior training and experience to perform her services. You allowed the worker to choose the days and hours she wanted to work and make her own schedule. The worker performed her services on your firm's premises. You stated that the worker was not required to perform her services personally.

You provided the color and other bar products. The worker provided all tools and products needed to perform her duties. You paid the worker on a commission basis which you stated served as rent to use the station/shampoo bowl/color bar. You did not cover the worker under workers' compensation. Customers paid your firm directly for services at prices that you established. Neither party indicated an investment by the worker in your firm or a related business, or the risk of the worker incurring a financial loss beyond the normal loss of compensation.

You did not make benefits available to the worker. Both parties reserved the right to terminate the work relationship without incurring a penalty or liability. You stated that the worker advertised by giving out her cell number to clients and using social media. She stated that you provided business cards. The worker provided her services under your firm's name.

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, your 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.

Factors that illustrate whether there was a right to control how a worker performed a task include training and instructions. In this case, although you relied upon the worker's prior training and experience to perform her services, as the owner of the firm, you must have been responsible for resolving any problems or complaints that may have occurred, showing you retained the right to change the worker's methods and to direct the worker to the extent necessary to protect your financial investment and ensure your clients' satisfaction. You stated that worker was not required to perform her services personally; however, there is no indication that she could engage and pay others to perform services for your firm on her behalf, presuming you were interested in the methods used to accomplish the work as well as in the results. These facts show that you 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, rent a booth, 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. You paid the worker on a commission basis. The opportunity for higher earnings or of gain or loss from a commission arrangement is not considered profit or loss. Any services performed by the worker benefited your business, and you incurred a loss for any lack of business. The worker utilized her personal tools and products. 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. These facts show that you 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 your firm's name. The worker was not engaged in an independent enterprise, but rather the services performed by the worker as a stylist were a necessary and integral part of your salon and spa 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 you did not make benefits available to the worker, neither party incurred liability or penalty when the work relationship terminated, a factor indicating an employer-employee relationship. These facts show that you retained control over the work relationship and services of the worker.

Based on the above analysis, we conclude that you 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.