

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 operates a store to provide wigs, wig services, and salon services. The worker was engaged by the firm as a stylist to provide assistance for overflow work. The firm reported the worker's remuneration on Forms 1099-MISC for 2017 and 2018.

Information from the parties supports that the firm relied upon the worker's prior experience and training to perform her services. The firm stated that its business is sporadic from hour to hour, and especially from season to season. Accordingly, the firm contracts with trained providers to provide assistance for overflow work that its regular workers and the owner cannot handle. The worker was not required (or asked) to perform core tasks that were necessary to the central operation of the firm, such as opening or closing the store, operating the cash register, performing inventory counts, cleaning the store, answering the phone, calling customers about instructions or picking up a wig, etc. The worker was contracted to take walk-ins. While at the store awaiting customers, and at her own discretion, she performed wig cleaning services. As there were still times when there was insufficient coverage for busy hours, the firm scheduled the customers to come back when they could be assured of receiving assistance. The firm consulted with the worker as to the day and time to set those appointments. The worker was not required to work a set schedule, and the firm did not dictate the days or times the worker would provide services. If the firm called the worker due to overflow work, the worker was the one who decided whether or not to go in. She provided services as she saw fit and came and went as she wished. There were never repercussions for not being at the store, including times the worker indicated she would be at the store but then chose not to. The worker helped the customers based on her own experience. If a client had a problem with the worker's service, the worker was required to work it out, even if it meant providing additional services at no charge to the customer; if the problem was with the firm's product, the firm was responsible for its resolution. The worker worked various days at various times. She performed her services on the firm's premises. The worker was not required to attend meetings. She was required to perform her services personally.

The firm provided a station, chair, wall mirror, dresser, and a wig steam cleaning machine. The worker provided her specialized tools (clippers, shears, etc.) and supplies. She incurred expenses for marketing her own brand. The worker was responsible for maintaining her own licenses and insurance. She did not lease space or equipment. The firm paid the worker on a commission basis or at an hourly rate. It paid the worker weekly by business check and issued her Form 1099-MISC at the end of each year. The firm allowed the worker to market and sell its line of hair extensions, thus she had the potential to profit from the store, and was subject to losing money due to her acceptance of risk in relation to the services she provided. The worker risked the loss or damage to her equipment and could have suffered personal liability for harm to a client. The firm set the price for wigs and wig supplies. For wig cleaning services, the firm raised the price twice at the prompting of the worker, who was paid a majority of the charge as a commission for that service. Neither party indicated an investment by the worker in the firm or a related business.

The firm did not make benefits available to the worker. It did not prohibit the worker from performing similar services for others during the same time period. The firm allowed the worker to have her own business cards in the store, but she never paid to have any printed (the firm would not agree to pay for the printing). There is no evidence submitted showing the worker advertised her services or maintained a business listing. Both parties retained the right to terminate the work relationship at any time without incurring liability or penalty, and in fact, the firm terminated the work relationship without notice and without cause, as allowed by their agreement.

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. The firm's statement that the worker performed services on an as-needed basis and was therefore, an independent contractor, is without merit as both seasonal employees and independent contractors can perform services when the needs of a business warrants.

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 relied upon the worker's prior training and experience to perform her services. Some employees may work without receiving instructions because they are highly proficient and conscientious workers or because the duties are so simple or familiar to them. Furthermore, the instructions, that show how to reach the desired results, may have been oral and given only once at the beginning of the relationship. The worker performed her services on the firm's premises. The firm 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. The worker was required to perform her services personally, meaning that 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 lease space, 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. 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. The firm paid the worker on a commission basis or at an hourly rate. The opportunity for higher earnings or of gain or loss from a commission arrangement is not considered profit or loss. Any services and sales made by the worker benefited the firm's business, and the firm incurred a loss for any lack of business. Payment by the hour generally points to an employer-employee relationship. 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 was not engaged in an independent enterprise, but rather the sales and services performed by the worker were a necessary and integral part of the firm's business of providing wig sales and other salon services. 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. The worker could have performed similar services for others during the same time period; however, it is possible for a person to work for a number of people or firms concurrently and be an employee of one or all of them. The firm terminated the work relationship without incurring liability or penalty. The right to discharge a worker is a factor indicating that the worker is an employee and the person possessing the right is an employer. These facts show that the firm retained control over the work relationship and services of the worker.

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.

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 for all services, and not an independent contractor operating a trade or business.