

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 worker initiated the request for a determination of her work status as a barber stylist in tax year 2018, for which she received Form 1099-MISC. The firm's business is described as a barbershop.

The firm's response was signed by the owner. The firm's business is a barbershop. The worker provided services as a licensed cosmetologist; she performed haircuts, shampoos, and hairstyling.

The worker indicated she was given instructions as to which clients she could/could not service, what hours she could/could not work, what chores and cleaning around the shop to do, and what prices to charge. The job assignments were given verbally and via text. The firm determined the methods by which the worker's services were performed. Any problems or complaints encountered by the worker were directed to the firm for resolution. The worker's services were rendered on the firm's premises, Monday and Friday from 10am-6pm, Thursday 1pm-6pm and Saturday 10am-4pm and any time that the firm's owner did not want to come in. The worker was required to perform the services personally; any additional personnel were hired and paid by the firm.

According to the firm, there were no specific training and instructions given to the worker. The worker's job was servicing her own customers and she would choose which walk-in customers she would service. The worker and the state licensing board determined the methods by which the worker's services were performed. The worker was responsible for resolving any problems or complaints. The worker's services were rendered on the firm's premises, with the worker setting her own hours. The worker was required to perform the services personally; the worker never hired anyone else to assist her or substitute for her.

The firm and worker acknowledge the firm provided the barbershop, chair, work station, some styling products, talcum powder, disinfectants, and rubbing alcohol. The worker furnished clippers, shears, guards, combs, and some styling products. The firm responded the worker did lease equipment, space, or a facility for 40% of her earned income; the worker disagreed. Both parties agree the worker was paid a commission; however, they disagree as to which party the customer paid. The worker stated that all customer paid through the shop's register and that an end-of-day sales report would be printed. Zelle, the money transfer service used as a means of receiving debit transactions, were sent to the firm's account, and were then run through the firm's register. The worker was not covered under the firm's workers' compensation insurance policy. The worker was not at risk for a financial loss in this work relationship unless she had the loss or damage to shears, clippers, and/or guards which she would have to replace. The firm and worker did not agree as to which party established the level of payment for services provided or products sold.

The firm and worker agree there were no benefits extended to the worker and that either party could terminate the work relationship without incurring a liability or penalty. The worker was not performing same or similar services for others during the same time frame and noted the firm had initiated a contract that addressed non-competition within a 2-mile radius of the county in which firm operated for 2 years. The worker stated she could not have her own business card; she had to give out the firm's. The worker stated she was fired for not re-signing the agreement with two additional pages. The firm stated the worker terminated the work relationship.

The worker provided copies of email communications regarding: straightening up the shop; filling in for the firm/owner; signing and back-dating the contract; tax advice from the firm as to income reporting and expenses; worker's request for time off; worker's request to close shop early.

Both parties provided a copy of the Independent Employment Agreement dated 10-1-2017, with regards to the worker working at the firm's location, the worker paying the firm 40%, the non-competition clause, and a hand-written add-on to the original contract that covered weekly chores of sweeping, mopping, cleaning mirrors, trash, cleaning bathroom, and folding towels.

Additional responses to firm's SS8: the worker was not required to accept any customer; the worker not subject to rules of the shop; worker set her own hours, including working Mondays when shop had been closed; the worker was paid based on a percentage of the work she performed as negotiated when she was engaged; the worker was responsible for her own transportation to and from work; and, the only reports she was required to submit was for services she performed so that she could be paid accurately for the work performed; and, the worker only accounted for tips when they were paid into the shop's online account.

Analysis

A worker who is required to comply with another person's instructions about when, where, and how he or she is to work is ordinarily an employee. This control factor is present if the person or persons for whom the services are performed have the right to require compliance with instructions. 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.

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.

The establishment of set hours of work by the person or persons for whom the services are performed is a factor indicating control. 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.

Payment by the hour, week, or month generally points to an employer-employee relationship, provided that this method of payment is not just a convenient way of paying a lump sum agreed upon as the cost of a job. In such instances, the firm assumes the hazard that the services of the worker will be proportionate to the regular payments. This action warrants the assumption that, to protect its investment, the firm has the right to direct and control the performance of the workers.

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. Also, if the firm has the right to control the equipment, it is unlikely the worker had an investment in facilities.

A person who can realize a profit or suffer a loss as a result of his or her services is generally an independent contractor, while the person who cannot is an employee. "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.

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.

We have considered the information provided by both parties to this work relationship. 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 and business reputation and to ensure its customers' satisfaction. The worker was not operating a separate and distinct business; 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. 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. 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.

CONCLUSION

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.