

SS-8 Determination—Determination for Public Inspection

Occupation 05PCP.5 Personal Care Worker	Determination: <input checked="" type="checkbox"/> Employee <input type="checkbox"/> Contractor
UILC	Third Party Communication: <input checked="" type="checkbox"/> None <input type="checkbox"/> Yes

Facts of Case

The worker submitted a request for a determination of worker status in regard to services performed for the firm as an aesthetician, in addition to serving as its educator. The work done by the worker included specializing in facials, waxing, and body treatments, in addition to assessing the proficiency of others engaged by the firm. The firm is a salon, spa, and wellness center which specializes in beauty and relaxation. According to copies provided by the worker, the firm issued her Form W-2 for 2008 and 2009; Form 1099-MISC for 2009, 2010, and 2011. The worker filed Form SS-8 as she received both Form W-2 and Form 1099-MISC; however, the services performed did not change.

The firm stated the worker was initially engaged as an employee. In 2009, the firm restructured its business and the worker was reclassified as an independent contractor, in part, as she was now responsible for supplying her products, scheduling her appointments, and paying her taxes. Client services were performed at the firm's premises during its standard business hours. There was no formal booth rental agreement between the parties and the firm continued to collect client payments.

The worker stated the firm paid for and provided rigorous training to her as outlined in its policy and procedures manual. Work assignments were communicated to the worker by a computerized message board after having been booked by a third-party call center. The firm determined the methods by which assignments were performed and assumed responsibility for problem resolution. The firm required the worker to prepare a charge slip which was given to its front desk staff after a service was completed. The firm required the worker to attend meetings, shows, and special events as scheduled. The worker's routine was to show up 30 minutes prior to her scheduled shift to set up. The worker checked the internal message board for assignments, schedule changes, and memos. The worker checked lounges for cleanliness and dirty linens. The worker serviced clients and stayed on site for 30 minutes after her shift to clean up. The firm required the worker to personally perform services.

The worker stated the firm provided equipment, spa items, linens, jars and accessories, and disposable supplies. The worker provided personal tools, implements, disposables, and uniforms. The worker did not lease equipment, space, or a facility. The worker did not incur expenses in performing services for the firm. Clients paid the firm. The firm paid the worker commission, in addition to tips; a drawing account for advances was not allowed. The firm carried workers' compensation insurance on the worker. The worker did not incur economic loss or financial risk. The firm established the level of payment for the services provided and the products sold.

The worker stated benefits were not made available to her. The work relationship could be terminated by either party without incurring liability or penalty. The worker did not perform similar services for others or advertise. There was no agreement prohibiting competition between the parties. The firm represented the worker as an employee to its clients. The work relationship ended when the worker quit.

Analysis

Generally, the relationship of employer and employee exists when the person for whom the services are performed has the right to control and direct the individual who performs the services, not only as to what is to be done, but also how it is to be done. It is not necessary that the employer actually direct or control the individual, it is sufficient if he or she has the right to do so.

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. A statement that a worker is 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.

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 services performed by the worker were integral to the firm's business operation. The firm's written policy and procedures, in addition to its independent contractor agreement and standards, evidences the firm retained the right to direct and control the worker to the extent necessary to ensure satisfactory job performance in a manner acceptable to the firm.

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 client 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. In this case, the worker did not invest capital or assume business risks. 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. Based on the commission rate of pay arrangement, the worker could not realize a profit or incur a 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. There is no evidence to suggest the worker performed similar services for others as an independent contractor or advertised business services to the general public during the term of this work relationship. The classification of a worker as an independent contractor should not be based primarily on the fact that a worker's services may be used on a temporary, part-time, or as-needed basis. As noted above, common law factors are considered when examining the worker classification issue.

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 the entire work relationship, and not an independent contractor operating a trade or business.