

SS-8 Determination—Determination for Public Inspection

Occupation 05PCP.7 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 from January 2013 to June 2013 as a nail technician. The work done included doing manicures, pedicures, gel nails, taking appointments for all workers (if not busy), and completing daily chores at end of day. The firm issued the worker Form 1099-MISC for the year in question. The worker filed Form SS-8 as she believes she erroneously received Form 1099-MISC.

The firm's response states it is a nail salon business. The worker performed services as a nail technician. The firm believes the worker was an independent contractor as the firm did not set the worker's schedule or assign any specific customers to the worker. If a customer wished to schedule an appointment with the worker, they called the worker's personal cell phone. The firm did not exercise direction or control over the manner in which services were performed and it did not provide training to the worker. There was no written agreement between the parties.

The firm stated it did not provide specific training or instruction as the worker was already licensed. Customers signed an intake sheet and the next available nail technician took customers on a first-come, first-served basis. The worker determined the methods by which assignments were performed and assumed responsibility for problem resolution. The firm required the worker to prepare a weekly work slip documenting the amount charged for each service performed. Meetings were not required. The worker had no scheduled hours. Services were to be performed during established salon hours. Services were performed at the firm's premises. The firm required the worker to personally perform services. The worker hired and paid substitutes or helpers. The worker stated the firm instructed her not to speak in a foreign language and to promote to customers the new products it had purchased. Work assignments were provided by meeting. The firm was contacted if problems or complaints arose. The firm was responsible for problem resolution. The worker performed services six days per week, working from open to close or later depending on customer needs. The firm hired and paid substitutes or helpers.

The firm stated it provided consumable items for manicures such as finger nail polish, lotions, etc. The worker provided and incurred the expense associated with tools necessary for manicures. Customers paid the firm. Under a verbal agreement with the worker, the firm retained 40% of gross receipts and paid the balance to the worker weekly. A drawing account for advances was not allowed. The firm did not carry workers' compensation insurance on the worker. The worker's economic loss or financial risk related to wear and tear on manicure tools. The firm set the minimum payment for each service performed. The worker stated the firm provided supplies, equipment, and the property. The worker provided tools such as nail clipper, cuticle pusher, etc. The worker did not lease equipment, space, or a facility. The worker was paid commission.

Benefits were not made available to the worker. The firm stated the work relationship could not be terminated by either party without incurring liability or penalty as the firm was required to pay the worker for services performed prior to termination. The worker did not perform similar services for others. The firm did not restrict the worker from advertising. There was no agreement prohibiting competition between the parties. The firm represented the worker as a nail technician. The work relationship ended when the worker stopped using the work station. The worker stated the firm represented her as an employee to its customers. Services were performed under the firm's business name. The work relationship ended when the worker quit and moved away.

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.

Therefore, the firm's statement that the worker was an independent contractor pursuant to a verbal 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.

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. In this case, the firm required the worker to personally perform services. Furthermore, the services performed by the worker were integral to the firm's business operation. The worker provided services in the firm's facility and for the benefit of the firm's clients, in addition to collecting customer payment for services performed. These facts evidence 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 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. 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. 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, and not an independent contractor operating a trade or business.