

SS-8 Determination—Determination for Public Inspection

Occupation 05PCP.9 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 April 2013 to November 2013 as a nail technician. 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 stated it is a solar nails and spa business. The worker performed services as a manicurist. The worker was an independent contractor as she worked for commission. There was no written agreement between the parties.

The firm stated it did not provide specific training or instruction to the worker. The worker received work assignments by appointment, walk-in, or customer request. The firm's manager determined the methods by which assignments were performed and assumed responsibility for problem resolution. Reports and meetings were not required. The worker came and left anytime. The firm did not require the worker to personally perform services. The worker stated the firm instructed her as to how to specifically perform the jobs, in addition to setting the prices. The firm provided work assignments. The firm required the worker to prepare a service ticket. The worker performed services at the firm's premises on a regularly scheduled basis. The worker performed manicures and pedicures, in addition to cleaning up. The firm required the worker to personally perform services. The firm was responsible for hiring and paying substitutes or helpers.

The firm provided supplies. The worker provided hand tools and equipment. The worker did not lease equipment, space, or a facility. The worker did not incur expenses in performing services for the firm. Customers paid the firm. The firm paid the worker commission. The firm did not guarantee the worker a minimum amount of pay or allow a drawing account for advances. The firm did not carry 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.

The work relationship could be terminated by either party without incurring liability or penalty. The worker did not perform similar services for others. The firm stated the worker advertised with business cards. The worker stated she did not advertise. There was no agreement prohibiting competition between the parties. The worker no longer performs services for the firm. The worker stated the firm represented her as an employee to its customers. Services were performed under the firm's business name.

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.

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 provided work assignments, determined the methods used, and assumed responsibility for problem resolution. 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 and as acknowledged by the firm, the worker did not incur economic loss or financial risk.

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