

**SS-8 Determination—Determination for Public Inspection**

Occupation

05PCP.10 Personal Care Worker

Determination:

☒ Employee☐ Contractor

UILC

Third Party Communication:

☒ None☐ Yes**Facts of Case**

The firm is in the business of operating a studio that provides eyelash extensions to customers. The worker was a lash technician who applied the lash extensions as well as performed facial waxing. She received a 2013 and 2014 Form 1099-MISC for her services. In 2012, the worker also provided her services however the amount did not warrant the issuance of a Form 1099-MISC. There was no written agreement.

Both the firm and the worker agreed that the firm provided training specific to the lash type that the worker would be applying. The worker received her work assignments (customer appointments) from the firm on an as-needed basis. Both parties also agreed that the firm determined the methods by which the assignments were performed and would be contacted as well as remain responsible for any problem resolution. The firm indicated that initially the worker kept service information on a note pad including the dates, amounts, and names of customers; later, the worker entered that information into a computerized system. The worker's hours were for set scheduled days, and times whether or not there were scheduled appointments; firm agreed that there were set scheduled hours but noted that the worker did not have to be there if there were no scheduled appointments. All the worker's services were performed at the firm's location. Both agreed that there were meetings. Both parties also agreed that the worker was required to provide the services personally and that only the firm would hire and pay any substitute workers.

Both the firm and the worker agreed that the firm provided all the equipment, supplies, materials, furnishings, linens, etc. including the studio space. The worker incurred the costs of her licensing. Both parties agreed that the worker was paid commission and had no other economic risk. Both agreed that the customer paid the firm (the worker submitted all cash received to the firm.) The firm noted that it carried workers' compensation insurance on the worker. Both agreed that the firm established the level of payment for services.

Both the firm and the worker agreed that there were no benefits and that either party could terminate the relationship without incurring a liability. The worker did not perform similar services for others. There was no written agreement. The worker noted that she performed all her services under the name of the lash studio. The relationship has ended.

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## Analysis

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In determining whether an individual is an employee or an independent contractor under the common law, all evidence of both control and lack of control or independence must be considered. The relationship of the worker and the business must be examined. Facts that show a right to direct or control how the worker performs the specific tasks for which he or she is hired, who controls the financial aspects of the worker's activities, and how the parties perceive their relationship should be considered. As is the case in almost all worker classification cases, some facts point to an employment relationship while other facts indicate independent contractor status. The determination of the worker's status, then, rests on the weight given to the factors, keeping in mind that no one factor rules. The degree of importance of each factor varies depending on the occupation and the circumstances.

There are significant similarities between this case and Revenue Ruling 73-591, 1973-2, C. B. 337. In that ruled case, it was determined that a beautician who 'leased' space in a salon, was required to work specific hours, furnished daily reports to the owner regarding her receipts for the day and paid for her own licensing was an employee. The salon furnished, repaired and maintained all the equipment materials and supplies. For her services the beautician received a set percentage of the money taken in by her. She was required to be at her chair at a specified time on those days that she came into work and to perform the services requested by the customers. The beautician furnished a daily report of her receipts on which her pay was calculated.

In this instant case, the worker also received commission, that is, a percentage of her receipts. Her customers paid the firm through the use of a 'common cash drawer,' in that all the monies were paid to the firm even if handled by the worker. The worker reported her receipts to the firm via a notepad or computer input on which her pay was calculated. While her hours were flexible, based on her scheduled appointments, her services were performed during the studio's open hours and fees charged were determined by the firm. The firm provided the facility, equipment, tools and supplies needed by the worker to provide her services illustrating that the worker had no business risk.

In addition, factors that illustrate whether there is a right to control how a worker performs a task include training and instructions. 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. Though the worker was licensed, the firm provided training in specific techniques. She performed her services according to the firm's scheduled work hour/days and the firm scheduled her appointments. 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. Also, the worker provided her services throughout the time period involved. A continuing relationship between the worker and the person or persons for whom the services are performed indicates that an employer-employee relationship exists. A continuing relationship may exist where work is performed in frequently recurring although irregular intervals.

Factors that illustrate whether there is 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 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. The firm provided everything needed by the worker to provide her services and received a commission based on her receipts. Profit or loss" implies the use of capital by a person in an independent business of his or her own. The opportunity for higher earnings or of gain or loss from a commission arrangement is not considered profit or 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. There were no benefits and there was no written agreement. The worker provided services as a lash tech at the firm's lash studio. She was not engaged in an independent enterprise, but rather the services performed by the worker were part of the necessary activities of the firm's business operations. 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.

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.