

SS-8 Determination—Determination for Public Inspection

Occupation 05PCP.13 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 firm is in the business of operating a nail salon. The worker was engaged as a nail specialist. The worker had previously owned and operated the business; however, she was engaged by the new owner to provide nail services. She received a 2013 Form 1099-MISC for her services; but in 2014, she received a Form W-2. There was no written agreement.

Essentially, both the firm and the worker were in agreement with the facts of the case involving the work relationship. The worker did not require any training or instructions as she was already experienced in this line of work. She received her work assignments when a customer walked-in or called for an appointment, with the firm noting that the workers took turns. The worker determined the methods by which the assignments were performed and the firm would be called if any problems or issues arose. No reports were required. The worker stayed in the firm's store until closing, waiting for customers. There were no meetings. The worker was required to provide the services personally.

The firm provided the facility and supplies. Only the firm mentioned that the worker provided her own tools. The worker was paid a fixed weekly amount (lump sum) and had no other economic risk. The firm noted that the customer paid the worker who turned over all the monies to the firm; the worker noted that the customer paid the firm. The firm indicated that it carried workers' compensation insurance on the worker. The worker did not establish the level of payment for services - the firm did. The firm however noted that the prices were preset and dictated by the competition.

There were no benefits and either party could terminate the relationship without incurring a liability. The worker did not perform similar services for others though the firm did not know. The worker was represented as a cosmetician operating under the firm's name. The relationship continued into the following year when the worker was treated as an employee.

Analysis

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.

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. The worker was an experienced nail technician. She performed her services according to the firm's scheduled work hours and days at the firm's location. 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.

Though the worker worked part-time, she provided her services on a continuous basis 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 worker now simply received a fixed weekly salary and had no other economic risk. 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. The firm provided the workplace and supplies. 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.

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 now performed services under the firm's name and entity. She was no longer engaged in an independent enterprise, but rather the services performed by the worker were now part of the necessary activities of the firm's salon 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.