

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

## Occupation

05PCP.22 Personal Care Worker

## Determination:

☒ Employee☐ Contractor

## UILC

## Third Party Communication:

☒ None☐ Yes**Facts of Case**

Information provided indicated the firm is a nail salon business. In the instant case the firm requested the work classification determination, at the request of the [REDACTED] Employment Commission. The firm has provided the names of four of the individuals performing services for the firm as manicurists. The firm has consistently reported the income on Form 1099-MISC.

The firm has indicated the workers are free to set their own schedule and they have their own clients. They are allowed to do nails at their homes or other locations. The firm indicated when they are done with their work they are free to leave. The firm states the workers are required to perform their services personally. The firm indicated she provided the nail polish, cotton, acetone, and alcohol. The workers provided their own tools, gloves, drill machine and supplies. The firm has indicated the workers do not lease space. They are paid on a commission basis. The customers pay the workers, but all money is turned over to the firm. The firm has indicated the worker establishes the level of payment for the services provided and the products sold. Either party can terminate the work relationship without incurring a penalty or liability. The firm stated the worker does perform similar services for others, her permission is not required. The firm indicated the workers pass out their own business cards. They are represented as contractors performing services under [REDACTED].

All parties provided a copy of the "Agreement between parties". It states, I [REDACTED] acknowledged that [REDACTED] doesn't withhold any state, federal or social security tax from their weekly pay checks. They understand they are independent contractors working at [REDACTED]. If any reason they no longer work there, it is a mutual agreement between them.

The firm's website states they are open Monday through Friday ten am to seven pm and Saturdays nine am to six pm. It specifically states walk-ins are welcome, as well as appointments. It lists the services provided, and the prices charged for each service. It stated current clients get a ten dollar gift card for referring family or friends. New clients are offered an instant five dollar credit.

The workers have responded to our request for information. All have provided basically the information. They have indicated they develop their own clientele, leads come from existing customers and the receptionist, and set their own schedule. They agree the firm provided the products and they provided their tools and drill machine. They agree they are paid on commissions and the customer pays the firm. One worker provided the firm kept half of the commission earned

The question of whether an individual is an independent contractor or an employee is one that is determined through consideration of the facts of a particular case along with the application of law and regulations for worker classification issues, known as "common law." Common law flows chiefly from court decisions and is a major part of the justice system of the United States. Under the common law, the treatment of a worker as an independent contractor or an employee originates from the legal definitions developed in the law and it depends on the payer's right to direct and control the worker in the performance of his or her duties. Section 3121(d)(2) of the Code provides that the term "employee" means any individual defined as an employee by using the usual common law rules.

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.

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. We must examine the relationship of the worker and the business. We consider 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. The degree of importance of each factor varies depending on the occupation and the context in which the services are performed.

Therefore, your statement that the worker was 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.

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## Analysis

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We have applied the above law to the information submitted. 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.

Evidence of control generally falls into three categories: behavioral control, financial control, and relationship of the parties, which are collectively referred to as the categories of evidence. In weighing the evidence, careful consideration has been given to the factors outlined below.

Factors that illustrate whether there is a right to control how a worker performs a task include training and instructions. In this case, you retained the right to change the worker's methods and to direct the worker to the extent necessary to protect your financial investment.

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.

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 your business. Both parties retained the right to terminate the work relationship at any time without incurring a liability.

## CONCLUSION

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. There is not a valid booth lease agreement that should have been in place for each worker. The workers would have paid the firm a set monthly rental fee period. They would have charged and collected kept each payment from the customer serviced. The firm's website lists the prices charged for each service, which indicates all personnel performing services at [REDACTED] would be required to charge those prices, not over not under as an independent contractor operating their own business entity would have been entitled to do. In order for a person to be an independent business person, they would not have been paid on a commission basis; the proceeds would not have gone into the firm's daily receipts, but deposited daily into their own business accounts. The firm's website stated existing customer will be given a gift card for referrals and new customers will be given a gift card also, making it a company policy, not a matter of choice by each individual person. The website states the firm is open on particular days and hours. Although the workers may have been free to state when they were available, the firm would have retained the right to mandate someone is there to ensure coverage of its hours of operation.