

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

## Occupation

05PCP.26 Personal Care Worker

## Determination:

☒ Employee☐ Contractor

## UILC

## Third Party Communication:

☒ None☐ Yes**Facts of Case**

The firm is in the business of operating a waxing spa that provides waxing, facials, and tanning services. The worker was engaged as an esthetician. She received a Form 1099-MISC for her services in 2011 through 2014. There was no written agreement.

Only the worker indicated that the firm provided training; she was also told to shadow other workers before taking any clients. Both parties indicated that the firm's receptionists scheduled clients, although the firm mentioned that clients could schedule directly with the worker as well. It is unclear whether the firm was referring to clients using its facilities when mentioning direct scheduling. Each party indicated that the other determined the methods by which the assignments were performed and would be contacted if any problems or issues arose. Both parties agreed that there were no required reports. The worker noted that her routine consisted of working set scheduled hours and days to provide various services to the firm's clients. She would clean and stock the room as well and was required to work two to four days a week. The worker sometimes was told not to come in for her scheduled day; she could not work more hours if she wanted to, and had to put in a request for time off. The firm however noted that the worker had no set routine; she worked at her own discretion as she asked to open the spa on Sundays to meet with her clients although information obtained indicated that the firm had Sunday hours. Both parties agreed that the worker provided services at the firm's location though the firm mentioned that she also performed services at her own spa and worked at the firm only two to three days a week. Both agreed that there were mandatory meetings to attend. Both parties agreed that the worker was to provide the services personally with the worker indicating that the firm would hire and pay any substitute workers.

Both the firm and the worker agreed that the firm provided the workspace, tables, waxing pots, linens, and all supplies. The worker indicated that she provided nothing; the firm noted that she provided some of her own tools. The firm mentioned that the worker leased space for her own spa and also listed expenses for the worker, some of which did not appear to be directly related to services for the firm. Both parties agreed that she received a commission per client with no minimum guarantee; there was no set rent. Both agreed that the customer paid the firm. The worker noted that she had no economic risk other than the loss of her salary; however, the firm mentioned the cost of her license, booth permit fee, supplies, advertising and continuing education. Both also agreed that the firm established the level of payment for services as it had a list of scheduled fees though the firm added that the worker could vary the fees and occasionally did so.

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; the firm disagreed. The worker noted that she was verbally restricted from working for other firms. The firm pointed out that the worker advertised her own business on facebook, linkedin and a website as well as had her own business cards. The worker noted that the firm provided all advertising and business cards. Both parties noted that the worker provided services under the firm's name. The relationship ended when the worker's services were terminated.

---

## 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.

There are 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 comparison, Revenue Ruling 73-592 1973-2 C.B. 338 determined that a beautician who rented a booth in a beauty salon for a fixed monthly fee, sold and styled wigs she purchased herself, retained the proceeds with no guaranteed minimum amount, selected her own customers, set her own schedule, adhered to shop rules, and maintained her own tools was engaged in a trade or business.

In this instant case, the worker received a percentage of her receipts, guaranteeing her a minimum of any receipt. The customers paid the firm through the use of a 'common cash drawer'. The firm charged the customer the firm's posted fee, and collected the funds. The firm then calculated the worker's commission; she received a check every two weeks. The worker did not pay a fixed monthly fee for working at the firm's workplace/ workspace. In this case, the worker did not even report her receipts to the firm as the firm had total control of the financial aspects of the worker's services. The firm booked appointments for its clients with the worker for set scheduled times. On the worker's scheduled days, she was expected to stay to service walk-ins when no appointments were scheduled. So while her hours/days were somewhat flexible, 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.

The worker provided her services continuously, even if part-time, throughout the years 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 the facility, workspace, receptionist services, furnishing, equipment, supplied and materials. 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. The worker did not pay a set rental fee for use of the firm's facility. She received a commission for each service she provided to the firm's clients. 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 was an esthetician providing services at the firm's place of business. Those services were essentially the firm's business activity; it advertised, marketed, and promoted those services. When working at the firm's location, the worker was not operating an independent business venture. 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.

It is acknowledged that the worker may have had her own business or performed similar services for others; understandable, as she only worked part-time for the firm. If a worker performs more than de minimis services for a multiple of unrelated persons or firms at the same time, that factor generally indicates that the worker is an independent contractor. See Rev. Rul. 70-572, 1970-2 C.B. 221. However, it is possible for a person to work for a number of people or firms concurrently and be an employee of one or all of them.

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.