

SS-8 Determination—Determination for Public Inspection

Occupation 05PCP.28 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 business as a beauty shop. As the owner of the firm, you engaged the worker as a cosmetologist. You reported the worker's remuneration on Forms 1099-MISC for 2009 through 2014.

Information from the parties supports that you relied upon the worker's prior training and experience to perform her services. The worker's assignments were based on scheduled appointments. She performed her services according to the clients' requests. If problems or complaints occurred, the worker contacted you for resolution. The worker reported her sales in the appointment book. She performed her services on your shop's premises. The worker was required to attend all meetings that you called. She was required to perform her services personally.

You provided all supplies, equipment, materials, and the property. Other than furnishing her own scissors, the worker did not incur expenses in the performance of her services. She did not lease space, a booth, a chair, or equipment. You paid the worker on a 50% commission basis. Customers paid you directly at prices that you established. You did not cover the worker under workers' compensation. Neither party indicated an investment by the worker in your shop or a related business, or the risk of the worker incurring a financial loss beyond the normal loss of compensation.

You did not make benefits available to the worker. Both parties reserved the right to terminate the work relationship at any time without incurring a penalty or liability. The worker did not advertise her services or provide similar services for others during the same time period. The worker terminated the work relationship.

Analysis

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. 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.

Factors that illustrate whether there was a right to control how a worker performed a task include training and instructions. In this case, while you relied upon the worker's prior training to perform her services, you were responsible for resolving any problems or complaints. You retained the right to change the worker's methods and to direct the worker to the extent necessary to protect your financial investment and ensure your clients' satisfaction. The worker's schedule was dependent upon the scheduled 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. The worker was required to perform her services personally, meaning she could not engage and pay others to perform services for you on her behalf. If the services must be rendered personally, presumably the person or persons for whom the services are performed are interested in the methods used to accomplish the work as well as in the results. These facts show that you retained behavioral control over the services of the worker.

Factors that illustrate whether there was 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 rent space, 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. "Profit or loss" implies the use of capital by a person in an independent business of his or her own. 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. You paid the worker on a commission basis. The opportunity for higher earnings or of gain or loss from a commission arrangement is not considered profit or loss. These facts show that you retained control over the financial aspects of the worker's services.

Factors that illustrate how the parties perceived 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 were part of the service recipient's regular business activities. In this case, the worker performed her services on a continuing basis. She performed her services under your shop's name. The worker was not engaged in an independent enterprise, but rather the services performed by the worker as a cosmetologist were a necessary and integral part of your beauty shop business. 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. Although you did not provide benefits to the worker, the worker terminated the work relationship without incurring a liability. If the worker has the right to end his or her relationship with the person for whom the services are performed at any time he or she wishes without incurring liability, that factor indicates an employer-employee relationship. These facts show that you retained control over the work relationship and services of the worker.

Based on the above analysis, we conclude that you 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.