

SS-8 Determination—Determination for Public Inspection

Occupation

05PCP.32 Personal Care Worker

Determination:

☒ Employee☐ Contractor

UILC

Third Party Communication:

☒ None☐ Yes**Facts of Case**

The worker submitted a request for a determination of worker status in regard to services performed for the firm from January 2014 to September 2014 as a hairstylist. The firm issued the worker Form W-2 and Form 1099-MISC for the year in question. The firm also issued the worker Form W-2 for 2013. There were no differences in the services performed in 2013 and 2014. The worker filed Form SS-8 as she believes she erroneously received Form 1099-MISC.

The firm's response states it is a hair salon business. Taxes were withheld from the worker's earnings from January through June 2014. Starting July 1, 2014, the firm stopped using an accountant. The worker became an independent contractor. The 2014 Form 1099-MISC reported tips as other income in Box 3 and commissions as non-employee compensation in Box 7. The worker was an independent contractor as she made her own schedule and taxes were not taken out of her earnings.

The firm stated it did not train the worker as she had to be state certified and licensed. The worker had her own clients and also performed services for walk-in clients. The firm's manager was contacted if problems or complaints arose. The worker was responsible for resolution. Reports were not required. The firm held a monthly meeting. The worker could attend or not. As an employee, the worker had scheduled work hours. As an independent contractor, the worker set her own schedule and was free to come and go as she chose. Services were performed at the firm's salon. The firm required the worker to personally perform services. The firm was responsible for hiring and paying substitutes or helpers. The worker stated the firm trained her on how to run the cash register. Work assignments were provided by appointment. The firm determined the methods by which assignments were performed. The firm was contacted and responsible for problem resolution. The worker's routine consisted of regularly scheduled hours; she averaged 32 – 40 hours weekly. The firm required her to attend staff meetings.

The firm stated the worker provided all supplies, equipment, and materials. The worker did not lease equipment, space, or a facility. Clients paid the firm; the worker received tips. The firm paid the worker commission. The firm did not carry workers' compensation insurance on the worker. The worker established the level of payment for the services provided. The worker stated the firm provided supplies, i.e. color, shampoo, conditioner, perm chemicals, and styling products, client chair, shampoo bowls, and cash register. The worker provided scissors, blow dryer, irons, hair rollers, hair brushes, and hair clips/pins. The worker incurred the unreimbursed expense of scissor sharpening and continuing education. The firm guaranteed the worker 42% - 52% (commission). A drawing account for advances was not allowed. Clients paid the firm. The worker did not incur economic loss or financial risk. The firm established the level of payment.

Benefits were not made available to the worker. The worker did not perform similar services for others. The firm stated it is unknown if the worker advertised. The work relationship ended when the worker quit of her own accord. The worker stated the work relationship could be terminated by either party without incurring liability or penalty. Business cards advertised the firm's salon but did not personally advertise her as a stylist. The firm represented the worker as an employee to its customers. Services were performed under the firm's business name.

The firm stated the worker was responsible for getting her own clients and obtaining new ones. The worker's clients provided her leads to prospective clients. The worker performed personal hair salon services. The worker stated she was not responsible for soliciting new clients.

Analysis

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.

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.

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. In this case, the firm required the worker to personally perform services. Furthermore, the services performed by the worker were integral to the firm's salon business. In addition to repeat business, the firm provided walk-in work assignments to the worker. The firm's on duty manager was contacted if problems or complaints arose. The firm collected client payment for services performed. These facts evidence the firm retained the right to direct and control the worker to the extent necessary to ensure satisfactory job performance in a manner acceptable to the firm. Based on the worker's education, past work experience, and work ethic the firm may not have needed to frequently exercise its right to direct and control the worker; however, the facts evidence the firm retained the right to do so if needed.

A person who can realize a profit or suffer a loss as a result of his or her services is generally an independent contractor, while the person who cannot is an employee. "Profit or loss" implies the use of capital by a person in an independent business of his or her own. The risk that a worker will not receive payment for his or her services, however, is common to both independent contractors and employees and, thus, does not constitute a sufficient economic risk to support treatment as an independent contractor. If a worker loses payment from the firm's customer for poor work, the firm shares the risk of such loss. Control of the firm over the worker would be necessary in order to reduce the risk of financial loss to the firm. The opportunity for higher earnings or of gain or loss from a commission arrangement is not considered profit or loss. In this case, the worker did not invest capital or assume business risks. 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. Based on the commission rate of pay arrangement, the worker could not realize a profit or incur a 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. 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 the firm's business. Both parties retained the right to terminate the work relationship at any time without incurring a liability. There is no evidence to suggest the worker performed similar services for others as an independent contractor or advertised business services to the general public during the term of this work relationship. The classification of a worker as an independent contractor should not be based primarily on the fact that a worker's services may be used on a temporary, part-time, or as-needed basis. As noted above, common law factors are considered when examining the worker classification issue.

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 for the entire work relationship, and not an independent contractor operating a trade or business.

The firm can obtain additional information related to worker classification online at www.irs.gov; Publication 4341.