

SS-8 Determination—Determination for Public Inspection

Occupation

05PCP.34 Personal Care Worker

Determination:

☒ Employee

☐ Contractor

UILC

Third Party Communication:

☒ None

☐ Yes

Facts of Case

The firm is in business as a nail salon. As the owner of the firm, you engaged the worker as a manicurist to perform manicures and pedicures. You reported the worker's remuneration on Form 1099-MISC for 2014. Both parties submitted an unsigned "Independent Contractor Agreement".

Information from the parties supports that you relied upon the worker's prior training and experience to perform her services. The worker enclosed weekly schedules that you posted showing the dates and times she was expected to work. Her work assignments were based upon your clients' expectations. The worker was expected to resolve any problems or complaints that may have occurred. She performed her services on your salon's premises. You engaged additional personnel as your client base demanded. You stated that if the worker engaged additional personnel, she would have been responsible for compensating them.

You provided the salon space and supplies. The worker provided her personal tools, and any additional equipment and supplies necessary. There is no indication that the worker rented space or a booth. You paid the worker on a commission basis. You did not cover her under workers' compensation. Customers paid your salon directly at prices that you established. Neither party indicated an investment by the worker in your salon 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. You did not prohibit her from providing similar services for others during the same time period. The worker built a client base through word-of-mouth and social media outlets. Both parties reserved the right to terminate the work relationship at any time without incurring a penalty or liability, and in fact, 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, it is only reasonable to assume that you retained the right to change the worker's methods and to direct the worker to the extent necessary to protect your financial investment. The worker followed the schedule that you posted. She performed her services in your salon. 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. There is no indication that the worker engaged and paid others to perform services for you on her behalf. 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 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. The worker provided her personal tools and other products. 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. 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 salon's name. The worker was not engaged in an independent enterprise, but rather the services performed by the worker as a manicurist were a necessary and integral part of your salon's 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. The worker could have provided similar services for others during the same time period; 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. 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.