

SS-8 Determination—Determination for Public Inspection

Occupation 05PCP.35 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 salon and spa. The worker was engaged by the firm as an apprentice to gain salon experience. The worker also provided administrative services. The firm reported the worker's remuneration on Forms 1099-MISC for 2013 and 2014.

Information from the parties supports that the firm's expectation was that the worker would use her own discretion and comfort level in performing her salon services. The firm stated that the worker resolved problems or complaints at her discretion. The worker generally followed a routine schedule. She performed her services on the firm's premises. The worker was required to perform her services personally.

The firm provided the salon, booth, hair color, and supplies. The worker provided her own scissors and other equipment. The worker incurred mileage, advertisement, equipment, clothing, shoes, and cell phone expenses. She did not rent space or a booth. The firm reimbursed the worker for her cell phone expenses and a portion of equipment costs, i.e.: half of the cost for scissors. The firm paid the worker on a commission basis and \$100 toward tuition each month. It guaranteed her \$150/week. The firm allowed the worker advance payments, up to \$500/month, as needed. She would have been liable for the loss of the cell phone as it was in the salon's name. Customers paid the firm directly at prices established by the firm. The firm did not cover the worker under workers' compensation. Neither party indicated an investment by the worker in the firm or a related business. Other than the cost of the firm's cell phone, the worker did not risk incurring a financial loss beyond the normal loss of compensation.

The firm did not make general benefits available to the worker, but provided her with bonuses. The firm did not prohibit the worker from providing similar services for others during the same time period. There is no evidence presented that the worker advertised her services beyond social media or maintained a business listing. 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, the firm's 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, as the worker was an apprentice, the firm must have provided some guidance to the worker. It must have been responsible for resolving any problems that were beyond the worker's capacity to resolve, and retained the right to change the worker's methods and to direct the worker to the extent necessary to protect its financial investment. The worker performed her services on the firm's premises. If the work is performed on the premises of the person or persons for whom the services are performed, that factor suggests control over the worker, especially if the work could be done elsewhere. The worker was required to perform her services personally, meaning she could not engage and pay others to perform services for the firm 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 the firm 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 or a booth, 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 furnished her personal tools and supplies. 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 firm stated that it 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 the firm 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 the firm's name. 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. 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 the firm did not provide general benefits to the worker, she 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 the firm retained control over the work relationship and services of the worker.

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.