

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

Occupation 05PCP.36 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 day spa. The worker was engaged by the firm as a Full Specialist and Massage Therapist. The firm reported the worker's remuneration on Forms 1099-MISC for 2012 through 2015.

Information from the parties supports that the firm relied upon the worker's prior training and experience to perform her services. It provided her with its handbook to service protocols and further trainings at no cost, unless the agreement was terminated within the year. The worker was subject to evaluations. She performed her services according to the firm's service protocols and Department of Professional Regulation. If problems or complaints occurred, the worker contacted the firm and possibly the State; the worker and firm may have been responsible for their resolution. The worker provided the hours and days that she wanted to work, and the firm scheduled services for the worker at such dates and times. According to the handbook submitted by the worker, she was required to attend monthly staff meetings. The worker performed her services on the firm's premises. She was required to perform her services personally. If additional personnel were needed, the firm was responsible for hiring and compensating them.

The firm provided the basic supplies, tools, administrative services, and the property. The worker was responsible for her uniform, professional liability insurance, licenses, continuing education, and certifications; she had the option of using her own specialty tools. The worker did not lease space or equipment. The firm paid the worker on a commission basis. It did not cover her under workers' compensation. Customers paid the firm directly at prices established by the firm, but the worker could opt out of providing services at discounted rates. Neither party indicated an investment by the worker in the firm or a related business. Other than damage to equipment, the worker could not incur a financial loss beyond the normal loss of compensation.

The firm made bonuses available to the worker. The worker was subject to the non-solicitation and non-compete provisions in the agreement between the parties. The worker stated that she did not advertise her services or provide similar services for others during the same time period. Any advertising was for the benefit of the firm. The firm represented the worker as a contractor. The worker performed her services under the firm's name. The firm terminated the work relationship.

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**Analysis**

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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, while the firm relied upon the worker's prior training and certifications, the firm provided the worker with a handbook with detailed instructions. The worker was subject to evaluations, showing the firm retained the right to change the worker's methods and to direct the worker to the extent necessary to protect its financial investment and ensure its customers' satisfaction. The worker followed the schedule set by the firm, based upon her availability. She performed her services on the firm's premises. 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. 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, 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 was responsible for maintaining her licenses, insurance, etc. 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 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 spa 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 the firm did not provide benefits to the worker, it terminated the work relationship without incurring a liability. The right to discharge a worker is a factor indicating that the worker is an employee and the person possessing the right is an employer. 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.