

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

Occupation

05PCP.38 Personal Care Worker

Determination:

☒ Employee☐ Contractor

UILC

Third Party Communication:

☒ None☐ Yes**Facts of Case**

The firm is in the business of operating a nail and hair salon. The firm requested a determination for its workers engaged as nail technicians. There were no written agreements. There was a worker response.

The firm noted that no training or instructions were given if the workers were already competent; all were licensed by the state. The worker noted that her only instructions were to complete her work quickly. The workers received their work assignments from their own clients and would service walk-ins by taking turns as there was a checklist of which worker was there first. The workers were not responsible for soliciting new customers. Sometimes the worker would get leads to new customers by word-of-mouth from current clients. Each party indicated that the other determined the methods by which the assignments were performed; but both agreed that the firm would be contacted if any problems or issues arose. The firm noted that the worker reported the services performed and the charges that were incurred; the customers paid the appropriate amount at the front desk. The worker's hours varied. The worker indicated that she worked part-time scheduled hours, but was told that she needed to be there when the salon opened and work later as well. Both parties agreed that the work was performed at the firm's location. The worker noted that she was required to provide the services personally.

The firm provided the workplace, the workspace, chair, cash register, some polish and nail supplies/tools as well as water and towels. The worker provided her own tools and some special nail supplies/polish. She was not reimbursed for these. Both parties agreed that she was paid a commission and had no other economic risk. The worker mentioned that she was paid hourly for the first two months. Both also agreed that the customer paid the firm and that the salon set and posted the prices for services.

Both the firm and the worker agreed that there were no benefits and that either party could terminate the relationship without incurring a liability. The worker did not perform similar services for others though the firm mentioned that some workers did. The worker performed services and was represented as a nail technician of the salon. The relationship has ended as worker could not work the schedule that the firm required.

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## Analysis

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In determining whether an individual is an employee or an independent contractor under the common law, all evidence of both control and lack of control or independence must be considered. The relationship of the worker and the business must be examined. Facts that show a right to direct or control how the worker performs the specific tasks for which he or she is hired, who controls the financial aspects of the worker's activities, and how the parties perceive their relationship should be considered. As is the case in almost all worker classification cases, some facts point to an employment relationship while other facts indicate independent contractor status. The determination of the worker's status, then, rests on the weight given to the factors, keeping in mind that no one factor rules. The degree of importance of each factor varies depending on the occupation and the circumstances.

There are similarities between this case and Revenue Ruling 73-591, 1973-2, C. B. 337. In that ruled case, it was determined that a beautician who 'leased' space in a salon, was required to work specific hours, furnished daily reports to the owner regarding her receipts for the day and paid for her own licensing was an employee. The salon furnished, repaired and maintained all the equipment materials and supplies. For her services the beautician received a set percentage of the money taken in by her. She was required to be at her chair at a specified time on those days that she came into work and to perform the services requested by the customers. The beautician furnished a daily report of her receipts on which her pay was calculated. In contrast, Revenue Ruling 73-592 1973-2 C.B. 338 determined that a beautician who rented a booth in a beauty salon for a fixed monthly fee, sold and styled wigs she purchased herself, retained the proceeds with no guaranteed minimum amount, selected her own customers, set her own schedule, adhered to shop rules, and maintained her own tools was engaged in a trade or business.

In this instant case, the worker also received a percentage of her receipts, guaranteeing her a minimum. She did not pay a set weekly or monthly rental for the use of the firm's facilities, equipment, and supplies. She was not provided with a key to come and go when she pleased. She worked part-time during the firm's salon open hours, and worked according to a set schedule. The customers she serviced paid the firm through the use of a 'common cash drawer' at the front desk. The worker reported her services performed along with the applicable customer charges to the firm. She was paid by the firm, calculating her compensation based on that information. The charges for services were set and posted by the firm.

Factors that illustrate whether there is a right to control how a worker performs a task include training and instructions. In this case, 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. So while the worker might have performed her services independently of the firm's direct input and her scheduled hours varied, 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 as well as working at the firm's premises.

Factors that illustrate whether there is 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. The worker did not pay a set rental fee; she had no investment. 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. Furthermore, the opportunity for higher earnings or of gain or loss from a commission arrangement is not considered profit or 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. There were no benefits and there was no written agreement. The worker was a nail technician at the firm's nail and hair salon. When working for the firm at its salon, she was not engaged in an independent business venture, but rather her services were part of the services offered by the firm to its salon clientele. 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.

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.