

SS-8 Determination—Determination for Public Inspection

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| Occupation 05PCP.41 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

Information provided indicated the firm is nail salon business. The worker had been retained by the firm as a nail technician for tax year 2014, at the firm's [REDACTED] location. The firm reported the income on Form 1099-MISC. The firm stated the worker had not received any training or instructions, he had obtained his license at this own expense. The assignments were on a first come first basis. If there are no clients, there are no assignments. The worker indicated he had no set hours; work can be performed as long as the store is open. All services were performed on the firm's premises. He was to perform his services personally. The firm provided the nail polish, and space to work. He provided his own tools and cotton balls. He was paid on a commission basis. The customer paid the firm. Either could terminate the work relationship without incurring a penalty or liability. The firm indicated he did perform similar services for others. The firm indicated the worker stopped showing up.

The worker has indicated the owner of the salon gave specific instructions where and when to report to work. Time off was not allowed without prior permission. All work assignments came through the owner. He was not allowed to deny or select who he services. All services were performed at the firm's salon. Services were to be performed personally. The worker agreed the firm provided nail supplies and equipment. He provided his own tools for sanitary reasons. He stated he was paid on a piece work basis. The customer paid the firm. Either could terminate the work relationship without incurring a penalty or liability. He indicated he was represented as an employee of the firm.

The question of whether an individual is an independent contractor or an employee is one that is determined through consideration of the facts of a particular case along with the application of law and regulations for worker classification issues, known as "common law." Common law flows chiefly from court decisions and is a major part of the justice system of the United States. Under the common law, the treatment of a worker as an independent contractor or an employee originates from the legal definitions developed in the law and it depends on the payer's right to direct and control the worker in the performance of his or her duties. Section 3121(d)(2) of the Code provides that the term "employee" means any individual defined as an employee by using the usual common law rules.

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.

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. We must examine the relationship of the worker and the business. We consider 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. The degree of importance of each factor varies depending on the occupation and the context in which the services are performed.

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.

Analysis

We have applied the above law to the information submitted. 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.

Evidence of control generally falls into three categories: behavioral control, financial control, and relationship of the parties, which are collectively referred to as the categories of evidence. In weighing the evidence, careful consideration has been given to the factors outlined below.

Factors that illustrate whether there is a right to control how a worker performs a task include training and instructions. In this case, 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 services were performed on an on going basis under the firm's business name.

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 was paid either on a commission or piece work basis. The firm, (see their website) determines the rates charged to their clients. The firm indicated the clients paid the firm for the services received. The firm provided the supplies, equipment, space and clientele. The worker provided his own equipment, which would be deemed tools of the trade and not considered a financial investment.

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 your business. Both parties retained the right to terminate the work relationship at any time without incurring a liability.

CONCLUSION

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.