

SS-8 Determination—Determination for Public Inspection

Occupation

05PCP.42 Personal Care Worker

Determination:

☒ Employee☐ Contractor

UILC

Third Party Communication:

☒ None☐ Yes**Facts of Case**

The firm is in the business of providing men's grooming services. The worker was engaged as a stylist. She received a 2014 and 2015 Form 1099-MISC for her services. There was no written agreement.

Both the firm and the worker agreed that the worker was already trained and licensed; however the worker noted that she was told to perform her services expeditiously. The firm indicated that the worker was only responsible for servicing her clients; however, evidence was submitted showing that other duties were assigned by the firm as well. The worker indicated that she received her work assignments verbally from the owner or manager. She also indicated that the firm determined the methods by which the assignments were performed though the firm noted that it was the State Board of Cosmetology. Both parties agreed that the firm would be contacted for any unresolved problems or issues. There were no required reports. According to the firm, each month the worker would notify the firm of her availability for the next thirty days; once the firm scheduled the worker, she was required to follow that schedule. In fact, the firm had guidelines regarding excused and unexcused absences as well as what time to report for scheduled work hours. The worker noted that she arrived at the shop fifteen minutes prior; she clocked-in, performed services, cleaned the shop, and clocked-out. After arriving, the worker noted that she could not leave the building for any reason; the owner/manager controlled the clients she serviced as well as all the service pricing. Both parties agreed that the worker provided her services at the firm's location; the firm added that typically it was for 30-35 hours per week. The worker noted that there were required meetings; the firm disagreed but again evidence was provided that showed some meeting attendance was mandatory. Both parties agreed that the worker was required to provide the services personally with only the firm hiring and paying substitute workers.

Both the firm and the worker agreed that the firm provided the shop, chair, all equipment and furnishings; the worker added the firm also provided her with business cards and created an email account for her. Both parties agreed that the worker provided the tools of her trade. The firm noted that part of the percentage of her services it retained, covered the rental of her space. Both agreed that the worker was paid a commission with the firm noting that she had no other economic risk. Both agreed that the customer paid the firm and that the firm established the level of payment for services.

Both the firm and the worker agreed that there were no benefits. The firm noted that either party could terminate the relationship without incurring a liability; the worker noted that when she quit, the firm withheld her pay. The worker did not perform similar services for others; the firm disagreed. The firm mentioned a social media account where the worker mentioned her styling services; the worker noted that the firm provided all advertising and marketing. The worker was represented as one of the firm's stylists though the worker indicated she was represented as an employee working under the name of the firm. The relationship ended when the worker quit.

Analysis

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 received a percentage of her receipts, guaranteeing her a minimum as she paid no set rental fee. Her clients paid the firm through the use of a 'common cash drawer.' The worker reported her receipts to the firm. She worked the firm's set scheduled hours even if the schedule was based upon her availability. She worked during the the firm's's open hours; the fees charged 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. The fact that the firm scheduled the worker's hours a month in advance and indicated that the worker was required to conform to that work schedule, illustrated the control that the firm had over the worker's behavior. The establishment of set hours of work by the person or persons for whom the services are performed is a factor indicating control. 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. This element of behavioral control was further bolstered with the firm's employment guidelines that established rules for attendance, absences and disciplinary actions as well as the fact that the worker punched in/out on a time clock.

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 firm provided the workplace, the workspace, as well as equipment and supplies. Lack of significant investment by a person in facilities or equipment used in performing services for another indicates dependence on the employer and, accordingly, the existence of an employer-employee relationship. 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 worker did not pay a set rental fee which would have given her the possibility of a business risk. 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 hair stylist at the firm's place of business which promoted its ability to provide those services. She was not engaged in an independent business venture when working for the firm, but rather her services were essential to the firm's continuing operations. 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 firm noted that the worker worked for others; however, if a worker performs more than de minimis services for a multiple of unrelated persons or firms at the same time, that factor generally indicates that the worker is an independent contractor. See Rev. Rul. 70-572, 1970-2 C.B. 221. 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.

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.