

SS-8 Determination—Determination for Public Inspection

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| Occupation 05PCP.43 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 operating a nail salon. The firm engaged the worker a licensed cosmetologist to perform nail services for the firm's business operation. The firm required the worker to perform the services according to the firm's policies, standards, and regulations. The firm required the worker to devote all necessary time and attention (reasonable periods of illness excepted) to the performance of the duties assigned in the best interest of the firm. The worker received assignments through appointments and walk-ins. The firm and worker determined the methods used to perform the services. The worker contacted the firm regarding problems or complaints the worker was not able to resolve. The firm and worker determined the work schedules based on the firm's business needs and worker's designated availability. The firm required the worker to perform the services personally at the firm's place of business.

The firm provided equipment, materials, and supplies needed to perform the services. The worker provided personal tools. The worker did not lease equipment or space. The worker incurred personal tool expenses. The firm did not reimburse any expenses. The firm paid the worker on a commission basis and the customers paid the firm. The firm did not carry workers' compensation insurance. The firm indicated the nail technicians have the same service fees. The worker indicated the firm determined the level of payment for the services. The worker's economic loss and financial risk were related to damages or loss of personal tools.

There were signed independent contractor manicurist agreements during the course to the working relationship indicating the job, expectations, payment for services, confidentiality, termination and requirements for delegation of duties etc. The firm indicated the worker did perform similar services for others and was not required to obtain the firm's approval. The worker advertised her services with business cards and the firm allowed workers to advertise via any channels or methods. The firm referred to the worker as an independent nail technician under the firm's business name to the customers. Both the firm and the worker retained the right to terminate the working relationship at any time without incurring any liability.

Analysis

When a firm determines or retains the right to determine directly or through designation what, how, when, and where workers perform services an employer/employee relationship exists. For federal employment tax purposes, it is not necessary for firms to exert direct or continuous control nor that services be performed full-time on a fixed scheduled basis, it is sufficient that the firm retains the right to change the workers services, as they deem necessary for business purposes. When workers are engaged to perform services that are both necessary and integral to the firm's business operations it would be necessary that the firm retains control over the services being performed in order to protect the firm's business reputation and investment. In this case the firm engaged the worker who was licensed to perform services directly related to the firm's business. The firm required the worker to perform the assigned services in accordance with the firm's policies, standards, and regulations. The firm required the worker to perform the assigned duties faithfully, intelligently, and to the best of worker's ability. The firm required the worker to devote all necessary time and attention (reasonable periods of illness excepted) to the performance of the duties. The worker received assignments through appointments and walk-ins. The worker contacted the firm regarding problems or complaints the worker was not able to resolve for final resolution. The worker's work schedule varied based on the firm's business needs, worker's availability, and the firm's business hours of operation. The firm required the worker to perform the services personally at the firm's place of business. The firm's prior approval was required for the worker to hire substitutes or helpers. These facts evidence behavioral control by the firm over the services performed by the worker.

The firm provided equipment, materials, and supplies. The worker provided personal tools. The worker did not lease equipment or space. The worker did not incur any significant on-going business expenses. The firm paid the worker on a commission basis and the customers paid the firm. The firm determined the level of payment for the services paid by the customers. The worker could not suffer any economic loss due to on-going significant business capital outlays being made. The worker did not have control over profits made nor the risk of losses being incurred with regard to the services performed for the firm's business operation. These facts evidence financial control by the firm over the services performed by the worker. The opportunity for higher earnings or of gain or loss from a commission arrangement is not considered having control over profit or loss in regard to the operation of a business. The risk of loss or damage to tools provided by the worker would not be considered having control over profits and loss.

There were signed contracts entered into during the working relationship that indicated the worker to be an independent contractor. It is noted that whether there is an employment relationship is a question of fact based on the autonomy of the work relationship and is not subject to negotiation between the parties. The firm indicated the worker did perform similar services for others while performing services for the firm and was not required to obtain the firm's approval. Although this could be an important factor to consider in an independent contractor relationship, this factor alone would not make the worker to be an independent contractor. Many workers have more than one job at a time and may be an employee in one or all working relationships depending on the autonomy of each one. The worker did not advertise to the public as being engaged in a business operation but did advertise her services with business cards. The worker personally performed services for the firm at the firm's place of business under the firm's business name on a regular and continuous basis over several years.

Both the firm and the worker retained the right to terminate the working relationship at any time without incurring any liability. The right to discharge a worker at any time without incurring a liability for termination is a factor indicating that the worker is an employee and the person possessing the right is an employer. An employer exercises control through the threat of dismissal, which causes the worker to obey the employer's instructions. An independent contractor, on the other hand, cannot be fired without a liability so long as the independent contractor produces a result that meets the contract specifications. Likewise, 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.