

SS-8 Determination—Determination for Public Inspection

Occupation 05PCP.45 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 worker submitted a request for a determination of worker status in regard to services performed for the firm from November 2013 to August 2014 as a barber. The firm issued the worker Form 1099-MISC for the years in question. The worker filed Form SS-8 as an inquiry to determine his worker classification status for purposes of federal employment taxes and income tax withholding.

The firm's response stated it is a men's grooming service provider business. Services performed are cutting and styling hair and beards and providing straight razor shaves for clients. The firm also sells retail grooming products. The worker was engaged as a barber. He performed haircuts, shaves, and beard trims. The worker was an independent contractor as he 1) set his own schedule every 30-days; 2) was responsible for providing and maintaining tools and products; 3) set his own pace; thus directly being responsible for profit and loss; 4) was not under contract or non-compete agreement. The worker performed services at other locations as well. There was no written agreement between the parties.

The firm stated it did not provide training or instruction to the worker. The worker was required to be licensed by the state. Any further training or instruction was solely his responsibility. There were no special assignments given by the firm. The worker was responsible for providing client services each work day. The State Board of Cosmetology determined the methods by which assignments were performed. The worker was expected to resolve client issues. If the firm's reputation may have been negatively impacted, a shop manager may have intervened. Reports and meetings were not required. Each month the worker notified the firm of his availability for the next 30-days which resulted in a monthly schedule which the worker was required to follow. The worker performed services at the firm's premises approximately 25 – 35 hours each week. It is unknown the amount of time he devoted in performing services for others. The firm required the worker to personally perform services. If the worker was absent, the firm went without unless the worker found someone to provide coverage. Approval of the substitute was required by the firm's shop manager to ensure the firm's reputation was not damaged by someone it did not know. The firm paid contractors directly to ensure quality control. The worker stated the firm provided specific training and instruction related to additional duties related to janitorial details and point-of-sale system use. The firm determined the methods by which assignments were performed and assumed responsibility for problem resolution. The firm required the worker to attend mandatory unpaid staff meetings. Copies of the firm's leave request form evidences the worker was required to request and obtain written approval for time off. The form states, in part, leave requests were to be made to the General Manager in writing at least 30 days in advance, unless for illness or injury where a three-hour prior notification was requested. A request was not approved until receiving an authorization from the firm's General Manager.

The firm stated it provided the location including chair, mirror, shampoo bowl, water, etc. The worker provided all tools such as trimmers, scissors, blades, dryers, etc. and styling products. The worker shared a percentage of his services to cover expenses related to the firm providing the worker with a location in which to work, i.e. terms of the lease. Customers paid the firm. The firm paid the worker commission. There was no guaranteed minimum amount of pay or a drawing account allowed for advances. The firm did not carry workers' compensation insurance on the worker. The worker did not incur economic loss or financial risk. The worker did not establish the level of payment for the services provided or the products sold. The firm followed industry pricing standards, protecting its reputation through consistency in its choice of workers. The worker stated the firm also provided shampoo, shaving, and styling products, towels, e-mail account, and janitorial supplies. The worker did not lease equipment, space, or a facility. The worker did not incur expenses in performing services for the firm.

The work relationship could be terminated by either party without incurring liability or penalty. The firm stated the worker performed similar services for others; the firm's approval was not required for him to do so. There was no agreement prohibiting competition between the parties. The worker maintained an Instagram account where he promoted his work, wherever that work may have occurred. The firm represented the worker as its contractor, having the title of barber, to its customers. The work relationship ended when the worker quit without notice. The worker stated the benefit of personal days was made available to him. He did not perform similar services for others or advertise. The firm represented him as an employee to its customers. Services were performed under the firm's business name.

Analysis

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.

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.

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. In this case, the firm required the worker to personally perform services. Furthermore, the services performed by the worker were integral to the firm's business operation. The firm required the worker to adhere to the established work schedule or obtain prior approval from its General Manager. The firm ultimately assumed responsibility for problem resolution and approved the substitute who may have covered in the worker's absence in order to ensure no negative impact to its business reputation. These facts evidence the firm retained the right to direct and control the worker to the extent necessary to ensure satisfactory job performance in a manner acceptable to the firm. Based on the worker's education, past work experience, and work ethic the firm may not have needed to frequently exercise its right to direct and control; however, the facts evidence the firm retained the right to do so if needed.

A person who can realize a profit or suffer a loss as a result of his or her services is generally an independent contractor, while the person who cannot is an employee. "Profit or loss" implies the use of capital by a person in an independent business of his or her own. The risk that a worker will not receive payment for his or her services, however, is common to both independent contractors and employees and, thus, does not constitute a sufficient economic risk to support treatment as an independent contractor. If a worker loses payment from the firm's customer for poor work, the firm shares the risk of such loss. Control of the firm over the worker would be necessary in order to reduce the risk of financial loss to the firm. The opportunity for higher earnings or of gain or loss from a commission arrangement is not considered profit or loss. In this case, the worker did not invest capital or assume business risks. The shared percentage of services arrangement is not considered a valid lease agreement. 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. Based on the commission rate of pay arrangement and as acknowledged by the firm, the worker did not incur economic loss or financial risk.

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 the firm's business. Both parties retained the right to terminate the work relationship at any time without incurring a liability. There is no evidence to suggest the worker performed similar services for others as an independent contractor or advertised business services to the general public during the term of this work relationship. The classification of a worker as an independent contractor should not be based primarily on the fact that a worker's services may be used on a temporary, part-time, or as-needed basis. As noted above, common law factors are considered when examining the worker classification issue.

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.

The firm can obtain additional information related to worker classification online at www.irs.gov; Publication 4341.