

SS-8 Determination—Determination for Public Inspection

Occupation 05PCP.46 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 initiated the request for a determination of her work status as a hairstylist/barber in tax year 2014 and 2015. The firm's business is described as stylist cuts, close shaves, straight razor shaves, and other hair services.

The firm's response was a narrative prepared by a CPA; the POA was invalid. The following information was provided on behalf of the firm: the firm is a traditional barbershop serving the public by appointments and walk-ins; the customers can specify which barber and barbers are free to make the same choices; the firm pays the barbers 70% of the revenue they generate; the barbershop has posted prices but the barbers can discount the prices and keep all tips paid to them; barbers are responsible for maintaining clippers, scissors, razors and other equipment used in haircuts; the barber's schedules are negotiable; the proprietor finds barbers to fill the entire schedule; the firm does reasonably insist on a quality haircut as the finished product but does not direct how result is accomplished. It was also noted that most of the barbers have a key to the shop and the shop is open 7 days a week.

The worker responded that she was given specific training and instructions on how to use firm's POS, answer the phone using the firm's scripted greeting, how to cash out customers, schedule appointments, close out the till at the end of the day, do bank deposit, and clean. The job assignments were determined as the next person on the list unless a customer specifically requested a barber. The firm determined the methods by which the worker's services were performed. Any problems or complaints encountered by the worker were directed to the firm for resolution. The worker's services were rendered at the firm's business location. The worker was not required to perform the services personally; any additional personnel were hired and paid by the firm.

According to the worker the firm provided towels, all products, cleaning supplies, capes, shaving cream, chair, and cutting station. The worker furnished personal tools of the trade (scissors, clippers, razors, trimmer, oil). The worker did not lease equipment, space, or facilities and she did not incur expenses in the performance of the job. The firm paid the worker a commission; the customers paid the firm. The worker was not at risk for a financial loss in this work relationship. The firm established the level of payment for services provided or products sold.

There were no benefits extended to the worker. Either party could terminate the work relationship without incurring a liability or penalty. The worker was not performing same or similar services for others during the same time frame. The firm terminated the work relationship.

Analysis

A worker who is required to comply with another person's instructions about when, where, and how he or she is to work is ordinarily an employee. This control factor is present if the person or persons for whom the services are performed have the right to require compliance with instructions. Some employees may work without receiving instructions because they are highly proficient and conscientious workers or because the duties are so simple or familiar to them. Furthermore, the instructions, that show how to reach the desired results, may have been oral and given only once at the beginning of the relationship.

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.

Payment by the hour, week, or month generally points to an employer-employee relationship, provided that this method of payment is not just a convenient way of paying a lump sum agreed upon as the cost of a job. In such instances, the firm assumes the hazard that the services of the worker will be proportionate to the regular payments. This action warrants the assumption that, to protect its investment, the firm has the right to direct and control the performance of the workers. Also, workers are assumed to be employees if they are guaranteed a minimum salary or are given a drawing account of a specified amount that need not be repaid when it exceeds earnings.

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.

We have considered the information provided by both parties and have applied the above law to this work relationship. 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 and business reputation and to ensure its customers' satisfaction. The worker was not operating a separate and distinct business; 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. 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. 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.

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.