

SS-8 Determination—Determination for Public Inspection

Occupation 05PCP.47 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 in the business of providing skin rejuvenation, massage therapy and hair care services. The worker was engaged as a massage therapist who also performed clerical, receptionist and office manager duties as well. The worker received a 2011, 2012, and 2013 Form 1099-MISC for her services. There was a written agreement, signed and dated by the worker, acknowledging that she was providing services as contract labor and that the clients belonged to the firm.

The worker noted that she received on-the-job training from the owner/lead esthetician as well as books, literature, DVDs and manuals. She attended trade expos paid for by the owner; the firm indicated that it provided no training or instructions. However, the firm's responses addressed only the massage therapy services. The worker indicated that she was not responsible for soliciting clientele. She noted that she had bi-weekly sales quotas and that she worked inside the spa as well as a sales representative for the wholesale aspect of the business. Both agreed that the worker received work assignments from the firm via the central scheduler who scheduled appointments based on the worker's availability. Each party indicated that the other determined the methods by which the assignments were performed but both noted that the firm would be contacted if any problems or issues arose. The firm noted that the worker submitted invoices based on services performed; no invoices were provided. The worker noted that she maintained detailed clientele folders with descriptions of services and treatment plans but that these files belonged to the firm. The worker worked her scheduled hours each day and provided massage therapy services based on the store schedule. She sometimes worked a standard day as clerical/sales in the warehouse as well as at the store's front desk. The firm noted that the worker's routine varied based on the customers' demands. Both agreed that the worker only worked at the firm's location. Only the worker mentioned staff/store meetings. Both parties noted that the worker was required to provide the services personally.

Both the firm and the worker agreed that the firm provided the room and massage table with the worker adding all supplies as well. The firm noted that the worker might supply preferred lotions and oils. The worker noted that she was reimbursed for any miscellaneous office supplies that she purchased. Though the worker paid no set rental fee, the firm indicated that the worker effectively paid rent due to the split commission. Both agreed that the worker was paid a commission; the worker added that she was paid by the hour as well. She had no other economic risk. Both parties agreed that the customer paid the firm. Each indicated that the other determined the level of payment for services.

Both agreed the firm and the worker agreed that there were no benefits though the worker mentioned a concierge doctor. Either party could terminate the relationship without incurring a liability. The worker did not perform similar services for others during the same period of time though the firm disagreed. The worker mentioned that she was told verbally not to work for others; the firm noted that she was not to solicit clients of the firm as per attached agreement. The relationship has ended.

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.

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 firm obtained the clientele, scheduled the worker to provide the services, collected the payments, and paid the worker. The worker also provided other duties at the firm's locations for which she received instructions/training and an hourly rate of pay. Though the firm scheduled the worker based on her availability, once she was scheduled, she was required to provide her services at a specific time. The requirement that a worker be on the job at certain times would be an element of control. She performed her services according to the firm's scheduled work hours and days, whether performing massage services or her other duties. 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. In addition, the worker provided her services on a continuous basis throughout the time period involved. A continuing relationship between the worker and the person or persons for whom the services are performed indicates that an employer-employee relationship exists. A continuing relationship may exist where work is performed in frequently recurring although irregular intervals.

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, workspace, furnishings and supplies. There was no set rental fee; hence, the worker had no economic risk for a loss. The opportunity for higher earnings or of gain or loss from a commission arrangement is not considered profit or loss. 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 was paid a commission for her massage services but hourly for her other duties. 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.

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 was a written statement; however, the firm's belief 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. Also, in *Bartels v. Birmingham*, 332 U.S. 126, 1947-2 C. B.174, the Supreme Court stated that whether there is an employment relationship is a question of fact and not subject to negotiation between the parties.

The worker was a massage therapist at the firm's place of business which offered massage therapy along with other types of services. When working for the firm, she was not engaged in an independent business venture, but rather her services were part of the essential activities of the firm's operations. Her clerical and/or sales services were support activities for the firm's operation and were not evidence of an independent contractor relationship. 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.

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.

Please see Publication 4341 for guidance and instructions for firm compliance.