

SS-8 Determination—Determination for Public Inspection

Occupation

05PCP.51 Personal Care Worker

Determination:

☒ Employee☐ Contractor

UILC

Third Party Communication:

☒ None☐ Yes**Facts of Case**

The firm is in the business of providing alternative therapy services where providers of those services can offer them. The worker is a state licensed esthetician who provided services such as facials, waxings, chemical peels and make-up. She received a Form 1099-MISC for 2010 through 2015. There was an independent contractor manual provided.

The worker indicated that she had to sign a 'standards of practice' agreement that told her how to fold sheets, listed penalties for not attending meetings, noted that promotions/events need firm approval, etc. The firm agreed that they provided instructions as she was given a facility orientation and trained to use the firm's software. The worker noted that she received her work assignments through the firm's receptionist as the receptionist would schedule new clients who called in. The firm indicated that the worker's clients called the facility or her personal cell phone to arrange for services - a new client would call the firm. The worker was encouraged to recruit new clients but there were no quotas. The firm noted that she was responsible for serving, maintaining, and developing her own clientele. She solicited new clients via newspapers, facebook, radio promotions, and speaking engagements. Each party indicated that the other determined the methods by which the assignments were performed and would be responsible for any issues or problems that arose. Client notes/files were charted on a daily basis by the worker. The firm noted that the worker's schedule was based on her availability-could be during normal business hours, or after hours, or weekends. The worker noted that if she came in before the receptionist, she would open up the center, maintaining client charts in-between clients as well as doing laundry. At the end of the day, the room was cleaned and linens/supplies restocked. Both parties agreed that the worker worked at the firm's location with the firm adding that she also provided her services off-site and at special promotional events. Both also agreed that there were meetings with only the worker mentioning penalties for non-attendance. The firm mentioned trainings and meetings for alternative services. Only the worker noted that she was required to provide the services personally and that she was not able to hire helpers or subcontract out work. The firm indicated that the worker could hire/pay assistants.

Both the firm and the worker agreed that the firm provided the facility, workspace, furnishings, towels, linens and instruments. The firm noted that the worker supplied scrubs, oils, lotions, brushes, etc. Only the firm mentioned that a percentage of the worker's receipts covered the use of the facility and facial instruments. There was no lease agreement. The worker also paid a monthly software fee as well as her own licensing, advertising, insurance, and certain supplies. Both parties agreed that the worker was reimbursed for some supplies she purchased. The worker was paid commission with no guaranteed minimum. Both agreed that the customer paid the firm; if after hours, the worker would collect the fees and turn them over to the receptionist. Both agreed that the firm carried workers' compensation insurance on the worker. The worker had no other economic loss other than loss of salary or loss/damage to her equipment. Both parties agreed that the worker established the level of payment for her services by setting the fees for her services.

Both the firm and the worker agreed that there were no benefits and that either party could terminate the relationship without incurring a liability. The worker did not perform similar services for others; the firm disagreed. The worker noted that business cards with the firm's logo were mandatory; the firm noted that she advertised her services in the local newspaper, facebook, and radio. The worker provided her services under the name of the firm. The relationship ended when the firm terminated the worker's services.

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.

The firm referred to a court case, *Cheryl A. Mayfield Therapy Center v. Commissioner of the IRS*. That case, similar to this instant case, also had elements supporting both an employer-employee relationship as well as an independent contractor. However, in that case, there was a set base rental fee. A fixed percentage rate on services does not equal a set rental fee. There were other elements in that court case that supported an independent contractor finding yet differentiated from this instant case. For example, the worker had to have the firm's approval before the worker could schedule or attend an event on the firm's behalf as well as needing the firm's approval if she altered her work schedule. The court case also outlined the elements supporting an employee finding such as the integration of the worker's services in the firm's operations; working at the firm's premises; the firm providing some initial training; the client paying the spa not the service provider; the worker not making services available to the general public regularly; and assisting in booking appointments and taking payments. Most of these elements exist in this instant case also.

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 provided the worker with an initial orientation and training as well provided an independent contractor manual that explicitly detailed various aspects of the worker's expected behavior and duties. The worker provided her availability to work in order for the firm to schedule appointments; however, if no appointments were scheduled she was to remain on-call if needed. She was also to arrive prior to her first appointment and inform the firm of her arrival, departure and scheduled absences. 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. The worker could change her schedule or participate in event but was subject to the firm's approval as addressed in the manual. 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 facility, workspace, furnishings, towels/linens and instruments. 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 firm retained a set percentage of the worker's services; however, a set percentage does not equate to a set rental fee for use of the firm's facilities. The opportunity for higher earnings or of gain or loss from a commission arrangement is not considered profit or loss. While both parties agreed that the worker established the fee for services, her ability to change her rates were restricted by the fact that the firm advertised the rates in its published brochures and through other venues.

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. The worker was an esthetician at the firm's place of business offering those services. She was not engaged in an independent business venture when providing services under the firm's name as the patients' records/charts initiated and maintained by the worker remained the property of the firm. Her services were part of the firm's wellness center activities. 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. This was clearly evidenced by the extensive policies and procedures addressed in the manual requiring the worker to acknowledge receipt of the manual and committing to adhering to its policies.

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.