

## SS-8 Determination—Determination for Public Inspection

Occupation

05PCP.55 Personal Care Worker

Determination:

☒ Employee

☐ Contractor

UILC

Third Party Communication:

☒ None

☐ Yes

### Facts of Case

The firm is in business as a hair salon. The worker was engaged by the firm as an esthetician to perform facials, waxing, and lash services. The firm reported the worker's remuneration on Forms 1099-MISC for 2013, 2014, and 2015.

Information from the parties supports that the firm relied upon the worker's prior training and experience to perform her services. Clients called the firm for services. The worker performed her services during the salon's hours of operation, but she chose the days and hours that she worked, with the ability to change them if she wanted. If problems or complaints occurred, the worker contacted the firm for resolution. The worker performed her services on the firm's premises. She was required to perform her services personally; there were no substitutes.

The firm provided a room for the worker to work in. The worker provided her table, stool, waxes, and supplies. The firm provided the facial supplies and adjusted the worker's compensation accordingly. The firm paid the worker on a commission basis; it did not guarantee her a minimum amount. The firm did not cover the worker under workers' compensation. Customers paid the firm directly at prices established by the firm. Neither party indicated an investment by the worker in the firm or a related business, or the risk of the worker incurring a financial loss beyond the normal loss of compensation.

The firm did not make benefits available to the worker. The worker provided similar services for others during the same time period. The worker provided her services under the firm's name. Both parties reserved the right to terminate the work relationship at any time without incurring a penalty or liability, and in fact, the worker terminated the work relationship.

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## Analysis

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Factors that illustrate whether there was a right to control how a worker performed a task include training and instructions. In this case, while the firm relied upon the worker's prior training and experience to perform her services, the firm was responsible for resolving any problems or complaints that may have occurred. It retained the right to change the worker's methods and to direct the worker to the extent necessary to protect its financial investment. Once the firm made appointments for the worker, the worker followed the schedule. A requirement that workers be on the job at certain times is an element of control. The worker was required to perform her services personally, meaning she could not engage and pay others to perform services for the firm on her behalf. 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. These facts show that the firm retained behavioral control over the services of the worker.

Factors that illustrate whether there was 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. "Profit or loss" implies the use of capital by a person in an independent business of his or her own. The worker provided her table and stool, and supplies. 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 paid the worker on a commission basis. The opportunity for higher earnings or of gain or loss from a commission arrangement is not considered profit or loss. These facts show that the firm retained control over the financial aspects of the worker's services.

Factors that illustrate how the parties perceived 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 were part of the service recipient's regular business activities. In this case, the worker performed her services on a continuing basis. She performed her services under the firm's name. The worker was not engaged in an independent enterprise, but rather the services performed by the worker as an esthetician were a necessary and integral part of the firm's salon business. 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. The worker performed similar services for others during the same time period; however, it is possible for a person to work for a number of people or firms concurrently and be an employee of one or all of them. Although the firm did not provide benefits to the worker, the worker terminated the work relationship without incurring a liability. 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. These facts show that the firm retained control over the work relationship and services of the worker.

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.