

**SS-8 Determination—Determination for Public Inspection**

Occupation 05PCP.56 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**

Information provided indicates the firm is a specialty Natural Hair Salon. The worker performed services as a hair stylist in 2014 and 2015. The firm reported income on both Form W-2, then Form 1099-MISC. The firm explained, accredited beauty schools do not provide curly hair care education. The firm has an apprenticeship program where as W-2 employees, [REDACTED] licensed stylists are trained to perform naturally curly hair care services. The program is typically three to six months. The stylists are paid by the hour as an employee during their training (thus the W-2). Once training is completed, that relationship ends and the stylist is then 'given the option to offer their services to the Salon on an independent contract basis, or take their newly acquired skills to another Salon, or open their own businesses. If they decide to procure at the firm, they are required to procure a State of [REDACTED] business license and stylist liability insurance. Client scheduling is done by the firm, (but is not limited only to those means). All contract stylists are able to receive clients and scheduling on their own, via their own devices. They are provided a salon key, where they can access their work station at any time if they choose to (but mostly during the salon's regular business hours). The firm provides the back bar, styling chair and work station. They provide their own tools, which are provided by the salon at a cost percentage to keep color supply less complicated. The stylist is free to perform curly services "within the guidelines of their training", but can also perform other non-curly services in any matter they choose. The firm indicated they are paid on a commission and hourly wage, plus tips. They are paid thirty-eight to Forty percent of the service menu prices. The customer pays both the firm and the worker (cash tips are received by the worker). The firm indicates the stylist can adjust pricing during check out. The firm indicated the worker is given personal days and bonuses. Either party can terminate the work relationship without incurring a penalty or liability. The IC agreement prohibits the worker from teaching any of the firm's proprietary techniques. She was represented as a stylist of the firm. The firm indicated she quit.

The worker indicated she was a stylist for the firm and agreed from January 2014 through June 2014 she was paid as an employee. The worker has indicated there were no changes in the work relationship other than no taxes were withheld. The firm continued to set her hours, supplied all materials, and enforced a dress code, paid for marketing, products and education. Work assignments were via the front desk by walk-ins, and phone calls. She performed services from ten am to six pm. All services were performed on the salon premises. She indicated she was paid on a commission basis. The customer paid the firm. Either party could terminate the work relationship without incurring a penalty or liability. She indicated they could not leave before performing services for three years without paying a penalty. She was referred to as an employee of the firm. She agreed she quit.

Both parties provided copies of the contract agreement. The worker provided a copy of the firms' policies and procedures, to include all that was required by the firm.

**ANALYSIS**

The question of whether an individual is an independent contractor or an employee is one that is determined through consideration of the facts of a particular case along with the application of law and regulations for worker classification issues, known as "common law." Common law flows chiefly from court decisions and is a major part of the justice system of the United States. Under the common law, the treatment of a worker as an independent contractor or an employee originates from the legal definitions developed in the law and it depends on the payer's right to direct and control the worker in the performance of his or her duties. Section 3121(d)(2) of the Code provides that the term "employee" means any individual defined as an employee by using the usual common law rules. 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. 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. We must examine the relationship of the worker and the business. We consider 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 who controls the financial aspects of the worker's activities, and how the parties perceive their relationship. The degree of importance of each factor varies depending on the occupation and the context in which the services are performed.

Therefore, your statement 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.

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## Analysis

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We have applied the above law to the information submitted. 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.

Evidence of control generally falls into three categories: behavioral control, financial control, and relationship of the parties, which are collectively referred to as the categories of evidence. In weighing the evidence, careful consideration has been given to the factors outlined below.

Factors that illustrate whether there is a right to control how a worker performs a task include training and instructions. In this case, you retained the right to change the worker's methods and to direct the worker to the extent necessary to protect your financial investment.

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.

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 your business. Both parties retained the right to terminate the work relationship at any time without incurring a liability.

## CONCLUSION

Based on the above analysis, we find this to be an erroneous misclassification of employment and 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. Based on the information and documentation provided, the firm continues to direct the services performed at their salon. The services are performed under the firm's business name, according to their policies and procedures. After training the worker is required to stay at the firm for three years of service or pay a penalty. The policies provide a list requirements the "independent contractors" were required to follow. There is not a valid booth rental agreement in place, nor are the services performed separate and apart from the firm's business in totality. The firm would not be able to require anything, the worker would set her own appointments, set her own prices, collect her own money, and charge as she pleased for services to include under what the Salon charged. They would not have to follow a specific dress code etc. Therefore, we find the worker to have been an employee for all services performed.