

SS-8 Determination—Determination for Public Inspection

Occupation

05PCP.57 Personal Care Worker

Determination:

☒ Employee☐ Contractor

UILC

Third Party Communication:

☒ None☐ Yes**Facts of Case**

The worker submitted a request for a determination of worker status in regard to services performed for the firm from June 2010 to June 2015. The worker was originally engaged as a receptionist (2010 – 2011) and subsequently performed services as a full-time assistant and part-time receptionist (2011 – 2013) and hair stylist (2013 – 2015). The work done by the worker as a receptionist included answering calls, taking payments, scheduling appointments, salon maintenance, and courtesy services for clients. As an assistant, the worker had the same salon maintenance responsibilities and she would assist a master stylist in applying color, washing and styling, and closing the stylists' books at the end of day. As a commission-paid stylist, the worker provided client services during regularly scheduled hours established by the firm. The firm issued the worker Form 1099-MISC for the years in question. The worker filed Form SS-8 as she believes she erroneously received Form 1099-MISC.

The firm's response stated it is a hair salon business which provides hair services such as hair color, cuts, and styles. The worker provided hair care services on her own clients. The worker independently created her own services, availability, and supplied her own tools. There was an independent contractor agreement; however, the firm was unable to retrieve a copy of it.

The firm stated it did not provide the worker specific training or instruction. The firm had meetings which covered several topics and inspired new trends to try out on clients. The worker created her own availability and services. The worker determined the methods by which assignments were performed and she was responsible for resolving problems or complaints. The worker performed services at the firm's premises during hours which were convenient to the worker. The firm required the worker to personally perform services. Hiring substitutes or helpers was not applicable. The worker stated the firm initially provided her training in connection with services performed as a receptionist and assistant. The firm required the worker to sign a contract and the booklet included a front desk manual, conduct agreement, and dress code policies. As a commission-paid stylist, the firm required the worker to remain at the salon during scheduled hours in the event a walk-in client came into the salon. Clients called the firm's front desk. The firm's receptionist booked the appointment based on the worker's availability. Managers and stylists determined the methods by which assignments were performed. The firm was contacted and assumed responsibility for problem resolution. The firm required the worker to complete service tickets. From 2010 through 2013, the worker's routine consisted of clocking in, opening the salon, counting cash, answering phones, and assisting owners with various client services. The master stylist set the worker's schedule. The firm required the worker to attend sales, monthly, and staff meetings. The firm hired and paid substitutes or helpers.

The firm stated it provided the working station and backbar. The worker provided the tools needed for services rendered. The worker did not lease equipment, space, or a facility. The worker's expenses were unknown to the firm. The firm did not reimburse the worker for any expenses incurred. Customers paid the firm. The firm paid the worker commission; a minimum amount of pay was not guaranteed. A drawing account for advances was not allowed. The firm did not carry workers' compensation insurance on the worker. The worker did not incur economic loss or financial risk. The worker established the level of payment for the services provided. The worker stated the firm provided hair products, drapes, towels, client snacks and beverages, and cleaning supplies. The worker provided tools of the trade. The firm established the level of payment for the services provided.

Benefits were not made available to the worker. The work relationship could be terminated by either party without incurring liability or penalty. The worker did not perform similar services for others. The firm stated it is unknown if the worker advertised. There was no agreement prohibiting competition between the parties. The firm represented the worker as a contractor to its customers. The work relationship ended when the worker quit. The worker stated the firm prohibited her from working at other locations. The firm represented her as an employee to its customers. Services were performed under the firm's business name.

The firm stated the worker was not responsible for soliciting new customers for the firm. The worker was responsible for soliciting her own new clients. The worker stated the firm coached her to ask clients for referrals or ask them to leave online reviews. The firm provided leads to prospective customers. The receptionist had to label the client in the firm's scheduler as to the appropriate lead which resulted in the client utilizing the firm's facility.

Analysis

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.

Section 31.3121(d)-1(a)(3) of the regulations provides that if the relationship of an employer and employee exists, the designation or description of the parties as anything other than that of employer and employee is immaterial. Thus, if an employer-employee relationship exists, any contractual designation of the employee as a partner, coadventurer, agent, or independent contractor must be disregarded.

Therefore, the firm's 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. Furthermore, whether there is an employment relationship is a question of fact and not subject to negotiation between the parties.

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. In this case, the firm required the worker to personally perform services. Furthermore, the services performed by the worker were integral to the firm's business operation. The firm provided work assignments by virtue of the clients served and required the worker to attend meetings. These facts evidence the firm retained the right to direct and control the worker to the extent necessary to ensure satisfactory job performance in a manner acceptable to the firm. Based on the worker's education, past work experience, and work ethic the firm may not have needed to frequently exercise its right to direct and control the worker; however, the facts evidence the firm retained the right to do so if needed.

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. In this case, the worker did not invest capital or assume business risks. 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. As acknowledged by the firm, the worker did not incur economic loss or financial risk. Based on the commission rate of pay arrangement the worker could not realize a profit or incur a loss.

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 the firm's business. Both parties retained the right to terminate the work relationship at any time without incurring a liability. There is no evidence to suggest the worker performed similar services for others as an independent contractor or advertised business services to the general public during the term of this work relationship. The classification of a worker as an independent contractor should not be based primarily on the fact that a worker's services may be used on a temporary, part-time, or as-needed basis. As noted above, common law factors are considered when examining the worker classification issue.

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.

The firm can obtain additional information related to worker classification online at www.irs.gov; Publication 4341.