

SS-8 Determination—Determination for Public Inspection

Occupation 05PCP.58 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 worker initiated the request for a determination of her work status as a massage therapist in tax years 2014 through 2016. The firm's business is described as a massage therapy provider.

The firm's response was signed by [REDACTED], owner. The firm's business is described as massage. The worker performed services as a massage therapist.

The firm and worker agreed the worker, a licensed massage therapist, was not given specific training and instructions. Clients were assigned by the front desk staff. Any problems or complaints encountered by the worker were directed to the firm for resolution. Both parties acknowledged that the worker's services were rendered at the firm's location 4 days a week for 20-25 hours per week. The worker was required to perform the services personally. The firm indicated she was not required to perform services personally since the firm could hire substitutes. The firm responded that the worker determined the methods by which the services were performed; the worker disagreed, and stated the front desk personnel determined the methods based on the client's request.

Both parties concurred the firm provided space, linens, lotions, and other equipment, as well as a uniform shirt and that the worker furnished nothing, she did not lease equipment, and she did not incur expenses in the performance of the job. The customer paid the firm; the worker was paid per session. The firm and worker responded that the worker was not at risk for a financial loss in this work relationship and the firm established the level of payment for services provided or products sold.

There were no benefits of health insurance, paid vacations, sick pay, or paid personal days extended to the worker; however, the firm responded that the worker was entitled to bonuses if she worked 15 hours each week from Thanksgiving to April. Either party could terminate the work relationship without incurring a liability or penalty. Both parties acknowledged the worker was performing same or similar services for others during the same time frame; the firm encouraged the worker(s) to have other jobs.

Analysis

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.

If the work is performed on the premises of the person or persons for whom the services are performed, that factor suggests control over the worker, especially if the work could be done elsewhere.

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. In such instances, the firm assumes the hazard that the services of the worker will be proportionate to the regular payments. This action warrants the assumption that, to protect its investment, the firm has the right to direct and control the performance of the workers. Also, workers are assumed to be employees if they are guaranteed a minimum salary or are given a drawing account of a specified amount that need not be repaid when it exceeds earnings.

The fact that the person or persons for whom the services are performed furnish significant tools, materials, and other equipment tends to show the existence of an employer-employee relationship.

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.

We have considered the information provided by both parties and have applied the above law to this work relationship. 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 and business reputation and to ensure its customers' satisfaction and that its contractual obligations were met. The worker was not operating a separate and distinct business; 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. 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. 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.

CONCLUSION

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.