

SS-8 Determination—Determination for Public Inspection

Occupation

05PCP.64 Personal Care Worker

Determination:

☒ Employee

☐ Contractor

UILC

Third Party Communication:

☒ None

☐ Yes

Facts of Case

The worker initiated the request for a determination of his work status as a hair stylist in tax year 2014. The worker completed an application and was hired by the firm's owner. The firm's business is described as a full-service beauty salon.

The firm's response was signed by the owner. The firm's business is described as hair salon services. The worker performed services as a hair stylist.

According to the firm, the worker was not given training or instructions. The work was a result of the worker sending out his own marketing postcards and some walk-in customers. The worker determined the methods to use and was responsible for the resolution of any problems or complaints. The worker did not have a regular routine; he came in at his discretion. The firm responded that the services were rendered on the firm's premises and the worker was required to perform the services personally.

The worker stated he was required to attend mandatory monthly meetings and presentations for training. He was given a client to work on when it was his turn. The firm determined the methods by which the worker's services were performed; any problems or complaints encountered by the worker were directed to the firm for resolution. The worker's services were rendered on the firm's premises 6 days per week from 9 am to 6 pm; the worker was required to close out the cash drawer and fill out a report for the firm. The worker responded that he was required to perform the services personally.

The firm acknowledged providing the station; however, the worker furnished supplies, equipment, and tools. The firm responded that the worker leased equipment, space, or facility and the term of the lease was a percentage of each job performed. The worker was paid a commission; the clients paid the firm. The firm indicated the worker was at risk for loss of equipment, materials, and commission. The firm stated the worker established the level of payment for services rendered or the products sold.

The worker replied that there were no stations for rent and that the firm provided towels, styling products, mirrors, sanitation products. The worker furnished his own clippers, scissors, and hair dryer. The worker did not lease equipment, space, or facility and did not incur expenses in the performance of the job. The worker concurred that the firm paid him a commission on a bi-weekly basis; the clients paid the firm. The worker responded he was not at risk for a financial loss in this work relationship and the firm established the level of payment for the services provided or products sold.

Both parties agreed that no benefits were extended to the worker. Either party could terminate the work relationship without incurring a liability or penalty. The firm responded the worker was performing same or similar services for others during the same time frame; the worker did not agree. The worker indicated the firm ran advertisements and had pre-printed business cards and set the prices for services and styling products. The firm responded that the worker sent out postcards and handed out business cards.

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 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.

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.

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. Also, if the firm has the right to control the equipment, it is unlikely the worker had an investment in facilities.

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. 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.