

SS-8 Determination—Determination for Public Inspection

Occupation

05PCP.65 Personal Care Worker

Determination:

☒ Employee

☐ Contractor

UILC

Third Party Communication:

☒ None

☐ Yes

Facts of Case

The firm is a plastic surgery facility which also provides non-surgical skin care treatments. The worker was engaged by the firm as an esthetician to perform facials, microdermabrasion, and other services. The firm did not withhold taxes from the worker's remuneration in 2001 through 2016.

The agreement between the parties states, among other things, that the worker is an independent contractor; the firm shall determine the work to be done by the worker, but the worker determines the legal means by which she accomplishes the work specified by the firm; the firm will not withhold taxes of any kind, and the worker will not be entitled to any benefits; all confidential information is the property of the firm, and shall not be used for any purpose other than the business of the firm; all patients are patients of the firm, and are not patients or customers of the worker; and during the term of the agreement and for 18 months after the termination of the agreement, the worker will not solicit business and/or perform services for the firm's patients. Attached schedules state payment terms for individual treatments as commission rate, plus hourly for some services; and payment terms as twice a month upon receipt of invoices. The agreement provides for attachments for documents verifying the worker's established business; however, neither party submitted such attachments to the agreement. The firm submitted a logo using the worker's name, and a Facebook page stating "[REDACTED] Skincare" to solicit customers.

Information from the parties supports that the firm relied upon the worker's prior training and experience to perform her services. Occasionally the worker received training from outside vendors on machinery purchased by the firm and its supplies. The worker received assignments through physician referrals and business generated through her own purchased Facebook site. If problems or complaints occurred, the worker notified the firm's office manager, but the worker was responsible for resolving them. The worker maintained patient medical charts. She generally provided services two to three days per week during the firm's business hours, and adjusted her schedule according to the appointments made by the firm. The worker performed her services on the firm's premises. The firm stated that the worker was not required to attend meetings; the worker stated that she attended staff meetings, accreditation meetings, and safety and sanitation meetings. The firm stated that the worker was not required to perform her services personally.

The firm provided the office equipment, towels, machinery, treatment tables, products for sale, and the property. The worker provided her personal wax machine, magnifying mirror, sterilizer, and miscellaneous instruments. She did not lease space or equipment. The firm stated that it covered the worker under workers' compensation. It made bonuses available to the worker. 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.

Analysis

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.

Factors that illustrate whether there was a right to control how a worker performed a task include training and instructions. In this case, the firm relied upon the worker's prior training and experience to perform her services. Although the worker was responsible for resolving any problems or complaints, the firm held ultimate responsibility to ensure its customers were satisfied with the work, showing it retained the right to change the worker's methods and to direct the worker to the extent necessary to protect its financial investment. The firm required the worker to submit bi-monthly invoices detailing the services provided and the amount of products sold. A requirement that the worker submit regular or written reports to the person or persons for whom the services are performed indicates a degree of control. The firm stated that the worker was not required to perform her services personally; however, there is no indication that she could engage and pay others to perform services for the firm on her behalf. This presumes 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 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 generally 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. A continuing relationship between the worker and the person or persons for whom the services are performed indicates that an employer-employee relationship exists. A continuing relationship may exist where work is performed in frequently recurring although irregular intervals. The worker performed her services under the firm's name. Any solicitations by the worker for customers also benefited the firm. 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 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.

Generally a non-compete agreement indicates the employer is exercising the kind of control over the worker that an employer would exercise over an employee rather than an independent contractor. An independent contractor is expected to work for other entities, usually at the same time as he or she is working for the employer. Although the firm did not provide general benefits to the worker, neither party incurred a liability when the work relationship ended, a factor indicating 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.