

SS-8 Determination—Determination for Public Inspection

Occupation 05PCP.68 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 firm is in the business of operating a salon and spa. The worker was engaged as a hair stylist who eventually also provided services as a nail technician. He received a Form 1099-MISC for his services in 2013, 2014, and 2015. He was paid additional monies for those services in 2016 as well. There was a written agreement.

Only the worker indicated that he was given instructions regarding office procedures. The firm noted that he received his work assignments by appointment only; the worker agreed that he was assigned work by the firm's receptionist and manager. Each party indicated that the other determined the methods by which the assignments were performed. Both parties agreed that the manager would be contacted if any problems or issues arose. There were no required reports. The worker noted that he was given a set schedule by the manager to follow; the firm noted he performed manicures and pedicures as well as hair styling services. Both parties agreed that the worker worked at the firm's premises. Only the worker mentioned attending a skin care seminar. Both also agreed that the worker was to provide the services personally though each indicated that the other could hire but agreed that the firm would pay.

The worker noted that the firm provided the property, chemicals, and hair colors; he provided some hair brushes and combs. However, the firm indicated that it provided basic hair products and that the worker provided hair coloring along with all nail technician supplies. The worker noted that he was reimbursed for any supplies that he was asked to purchase on behalf of the firm. Both agreed that the worker was paid a commission and had no other economic risk. The customer paid the firm. Both agreed that the firm carried workers' compensation insurance on the worker. Each indicated that the other established the level of payment for services. The worker mentioned the salon's price menu.

Both the firm and the worker agreed that there were no benefits and that either party could terminate the relationship without incurring a liability. The worker did not perform similar services for others; the firm disagreed. The relationship ended; the worker noted that he was let go. The firm noted that he left and that they paid him additional compensation in 2016.

The written agreement included the following information:

- Agreement was for an independent contractor relationship
- Agreement was for 2 years as a hair stylist; after this time period, booth space can be rented for a minimum of 2 years
- Worker required to provide the services on the days and the hours specified by the firm management
- 40% commission as an IC; retail commission=10% for \$101-\$800 bi-weekly
- Worker's services can be terminated by firm without cause or notice
- Worker agrees to give the firm's management a 2-week notice if he decides to leave
- Agreement subject to a 90 day 'provisionary period'
- All client files are the firm's property
- All appointments are handled and booked by the firm's front desk
- Stylists are urged to stay at workstations; will be informed when next appointment arrives.

Analysis

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. The relationship of the worker and the business must be examined. 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 aspects of the worker's activities, and how the parties perceive their relationship should be considered. 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.

The firm's belief 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. So while the agreement indicated that the work relationship between the parties was one whereby the worker was an independent contractor, that did not make it so when other elements in the work relationship did not support that premise, including elements in the agreement itself.

There are significant similarities between this case and Revenue Ruling 73-591, 1973-2, C. B. 337. In that ruled case, it was determined that a beautician who 'leased' space in a salon, was required to work specific hours, furnished daily reports to the owner regarding her receipts for the day and paid for her own licensing was an employee. The salon furnished, repaired and maintained all the equipment materials and supplies. For her services, the beautician received a set percentage of the money taken in by her. She was required to be at her chair at a specified time on those days that she came into work and to perform the services requested by the customers. The beautician furnished a daily report of her receipts on which her pay was calculated.

Compare with Revenue Ruling 73-592 1973-2 C.B. 338, in which it was determined that a beautician who rented a booth in a beauty salon for a fixed monthly fee, sold and styled wigs she purchased herself, retained the proceeds with no guaranteed minimum amount, selected her own customers, set her own schedule, adhered to shop rules, and maintained her own tools was engaged in a trade or business.

In this instant case, there are similarities with Rev. Ruling 73-591. The worker received a percentage of his receipts, guaranteeing him a minimum percentage of any receipt. All of the worker's services were scheduled and handled through the firm's front desk. The worker's services were performed during the salon's open hours with hours and days scheduled by the firm. The customers he serviced paid the firm. He was paid a percentage of his receipts and fees charged were posted by the salon. The worker paid no set rental fee. All client files remained the property of the firm.

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. It is acknowledged that the worker provided some supplies and tools of his trade. However, the firm had the investment in the facility and equipment. 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. The opportunity for higher earnings or of gain or loss from a commission arrangement is not considered profit or 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.

The worker was provided services as a hair stylist and nail technician at the firm's salon and spa. When doing so, the worker was not engaged in an independent enterprise. His services instead were part of the services offered by the firm's business operations to the public. 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.

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.

Please see Publication 4341 for guidance and instructions for firm compliance.