

SS-8 Determination—Determination for Public Inspection

Occupation 05PCP.69 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 day spa. The worker was engaged as a massage therapist. She received a Form 1099-MISC for her services performed in 2012 through 2016; she continued to work in 2017 as well. There was a written agreement dated and signed in 2014 with no end date.

The worker noted that she was paid for training to learn specific massages; the firm indicated that it only provided orientation. The worker received her work assignments by the spa taking appointments and scheduling them during the worker's availability. The firm indicated that the worker would notify them of her availability and services; then appointments were assigned to her. Each party indicated that the other determined the methods by which the assignments were performed but agreed that the firm would be contacted if any issues or problems arose. The firm noted that the worker was to invoice for services; however, the information was pulled from the spa reservation system. The worker's work routine consisted of servicing the clients according to scheduled appointments. The firm indicated that the worker was not responsible for soliciting new customers. The front desk processed the client check-outs and re-booked the client. Both parties agreed that all the work was performed at the firm's premises. Only the worker mentioned staff meetings to attend without pay. Both parties agreed that the worker was required to provide the services personally with each party indicating that the other was responsible for hiring any substitutes.

Both the firm and the worker agreed that the firm provided the massage table; the worker added that the firm also provided most of the supplies. The firm noted the worker paid rent for the room and oils per the contract; however, this issue did not appear to be addressed in the agreement provided. The worker noted that she brought her own preferred oils to use. The firm noted the worker had rent, supplies, insurance, and license expenses for which she was not reimbursed. Both parties agreed that she was paid commission. The firm noted that canceled appointments or the lack of scheduled appointments would not generate any income for the worker; however, income would not be generated for either party. Both parties agreed that the customer paid the firm. Both agreed that the firm established the level of payment for services.

Both the firm and the worker agreed that there were no benefits. Either party could terminate the relationship without incurring a liability. The worker did not perform similar services for others though the firm did not know. There was a non-solicitation clause. The worker's services were performed under the firm's name with the firm providing business cards for the worker. The relationship has ended.

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.

There are significant similarities between this case and Revenue Ruling 73-591, 1973-2, C. B. 337. In the 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.

In contrast, consider Revenue Ruling 73-592 1973-2 C.B. 338 where 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 set percentage of her receipts, guaranteeing her a minimum of any receipt. Her customers paid the firm by checking out at the front desk, thereby utilizing a 'common cash drawer.' The worker reported her receipts to the firm by having her services/appointments entered into the firm's computerized reservation system. The firm scheduled appointments for her services based on her availability and during the firm's open hours.

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. The worker was expected to be at the firm's location to provide her services for those scheduled appointments. If the nature of the occupation makes fixed hours impractical, a requirement that workers be on the job at certain times is an element of control. Another element of control would be the fact that she worked at the firm's premises, illustrating her dependence on the firm for a place to work. In addition, the worker provided her services on a continuous basis throughout the time period involved. 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.

Only the firm could incur a profit or a loss as it had the investment in the facility and furnishings. The firm set the pricing, marketed the services and provided the worker with most supplies as well as business cards. The worker was not charged back for bad checks and the firm sometimes offered discounts/coupons on her services. There was no set rental fee for use of the firm's facility and the worker received a commission on each service she performed. She had no other economic risk other than the loss of her compensation as she had no investment. The lack of income from no-shows or no appointments being booked affected both parties with only the firm having the business risk. The worker's records were subject to inspection by the firm for purposes of auditing her compensation. The worker remained accountable to the firm for the use of the facilities and was to notify the firm if her availability to provide her services changed. The worker's services as a massage therapist were integrated into the firm's operation as a day spa. 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.

There were no benefits and there was a written agreement; however 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.

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.