

SS-8 Determination—Determination for Public Inspection

Occupation 05PCP Personal Care Providers	Determination: <input checked="" type="checkbox"/> Employee <input type="checkbox"/> Contractor
UILC	Third Party Communication: <input checked="" type="checkbox"/> None <input type="checkbox"/> Yes

I have read Notice 441 and am requesting:

- Additional redactions based on categories listed in section entitled "Deletions We May Have Made to Your Original Determination Letter"
- Delay based on an on-going transaction
- 90 day delay

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Facts of Case

The firm is a hair salon. The worker was engaged by the firm as a hair stylist. The firm reported the worker's remuneration on Form 1099-MISC for 2016.

The worker submitted the firm's guidelines stating, among other things, that stylists are to retrieve their schedules upon entering the salon; adjustments can be made to schedules throughout the day; stylists are to be visible for walk-ins or be visible to greet clients for the day; stylists are to greet clients in the waiting room and follow the stated procedures for checking them in and out; during off times and times without clients, stylists are to practice techniques, keep salon/station tidy, etc.; outlines of cutting services, color services, and the "walk-in" processes; stylists will not receive pay for sick days/vacation time and are required to alert the firm three weeks prior in regard to vacation time; two days of sick time per month are available, except for Saturdays; stylists are to choose break times according to their schedules and to coordinate with other stylists; in the event of a class, all stylists must attend; professionalism and attire guidelines are stated; and all stylists start at a 40% commission rate with an increase after six months to 45%, with the opportunity of further increases.

Information from the parties supports that the firm relied upon the worker's prior training and experience to perform her services. Her work assignments were based on scheduled clients and walk-ins. If problems or complaints occurred, the worker contacted the firm for resolution. The worker performed her services on the firm's premises. She attended mandatory meetings and classes. The worker was required to perform her services personally. If additional personnel were needed, the firm was responsible for hiring and compensating them.

The firm provided the work station, shampoo, color products, etc. The worker utilized her personal cutting/styling tools. She did not lease equipment or space, or incur expenses in the performance of her services. The firm paid the worker on a commission basis. It did not cover the worker under workers' compensation. 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.

The worker did not provide similar services for others during the same time period. When first hired, the worker signed a non-compete agreement. The worker performed her services under the firm's name. Both parties reserved the right to terminate the work relationship without incurring a penalty or liability, and in fact, the firm terminated the work relationship.

Analysis

Factors that illustrate whether there was a right to control how a worker performed a task include training and instructions. In this case, while the firm relied upon the worker's prior training and experience to perform her services, it required the worker to attend training sessions and to follow its guidelines, 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 and ensure its clients satisfaction. The worker followed the schedule set by the firm. She performed her services on the firm's premises. 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. The worker was required to perform her services personally, meaning she could not engage and pay others to perform services for the firm on her behalf. 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. 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 rent a booth or space, 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 worker furnished her personal cutting and styling tools. 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 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. She performed her services under the firm's name. The worker was not engaged in an independent enterprise, but rather the services performed by the worker as a hair stylist were a necessary and integral part of the firm's hair salon 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. The firm required the worker to sign a non-compete agreement at the beginning of the work relationship. 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 benefits to the worker, it terminated the work relationship without incurring a liability. The right to discharge a worker is a factor indicating that the worker is an employee and the person possessing the right is an employer. 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.