

## SS-8 Determination—Determination for Public Inspection

Occupation 05PCP.66 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 salon facilities that provided hair and nail care services on its premises. The worker was engaged as a hair stylist and nail care provider. She received a 2014 and 2015 Form 1099-MISC for her services. There was a written agreement.

The firm provided instructions on how to navigate the salon software. The worker noted that there were also mandatory classes in hair color and nail services. The worker received all her work/client assignments through the firm. Each party indicated that the other determined the methods by which the assignments were performed but agreed that the firm's salon manager would be contacted if any issues or problems arose. Only the worker mentioned submitting daily reports of her services via the firm's computer. She worked set scheduled hours and days at one of two salons operated by the firm. The firm noted that the worker determined her available hours and scheduled accordingly; she would check the schedule and provide the necessary services for the client. Both parties agreed that the worker worked at the firm's premises. Only the worker mentioned mandatory staff meetings. Both parties agreed that the worker was to provide the services personally; the worker noted that only the firm hired and paid any substitutes or helpers.

The firm noted that it provided the salon space as well as hair and nail supplies with the worker providing all necessary equipment and supplies that the firm did not provide. The worker noted that the firm also provided the blow dryer, clippers, shampoos, hair coloring, towels, schedule software, polishes, and nail clippers. She did supply scissors, combs, brushes and a curling iron. Both parties agreed that the worker was paid commission and neither mentioned any other economic risk. The worker paid no set rental fee and the firm set the prices for her services. The worker noted she was guaranteed a set percentage gratuity for the nursing facility clients. The customer paid the firm (even if through a resident account.) Both also agreed that the firm established the level of payment for services.

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 though the firm did not know. Both parties agreed that the worker was subject to a non-compete clause that indicated she could not work within an eight mile radius of the firm's location for one year upon termination. The worker noted that the firm provided business cards and placed coupons in the monthly newsletter advertising the salon's services. The relationship has ended.

The firm noted that the client contacts the salon regardless of who scheduled the appointment. The firm reassigned clients without the worker's permission. The worker noted that she was given a list of people from the firm when they moved into the facility. She reported to the salon manager the details of the services provided to the new clients. The worker provided her hair and nail services in a retirement community's hair salon as well as in its skilled nursing facility.

The independent contractor (IC) agreement was signed by the worker and dated 8/25/2014. The following information was included:

- o all ICs must maintain licensing;
- o IC responsible for scheduling customers and maintenance of independent schedule; not required to remain in salon beyond scheduled hours;
- o firm provides master liability policy;
- o agreement included the non-compete clause; termination of IC agreement must be in writing;
- o includes confidentiality clause; all customer info cards are sole property of the firm
- o firm provides supplies, hair colors, waves, cotton, paper products, back bar
- o laundry service for towels,
- o housekeeping for common areas,
- o telephone/reception desk/appointment book
- o advertising and promotion
- ICs will be paid commission (commission schedule included) based on regular price of services provided; also commission on retail products sold by IC; paid on a weekly basis

## 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 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.

Contrast the above ruling with 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 were similarities with Rev. Ruling 73-591. The worker received a percentage of her receipts, guaranteeing her a minimum of any receipt. She was required to work specific hours/days at the location designated by the firm. The firm provided the facility, equipment, supplies and materials. She paid no set rent. Her customers paid the firm regardless of whether their resident accounts were charged, or other forms of payment were used. The worker reported her receipts to the firm by entering the services into the firm's software. The firm calculated the worker's commission and paid her weekly. The firm set and posted the fees for her salon services.

Factors that illustrate whether there is a right to control how a worker performs a task include training and instructions. 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. All client scheduling was done through the firm whether through a receptionist or not. 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.

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. The fact that the worker provided brushes, combs and minor supplies would not be considered a significant investment. 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. 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. The worker was engaged to provide services in the firm's salon facilities. When doing so, the worker was not engaged in an independent enterprise. Her services instead were part of the necessary activities of the firm's business operations. 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.