

SS-8 Determination—Determination for Public Inspection

Occupation

05PCP.54 Personal Care Worker

Determination:

☒ Employee☐ Contractor

UILC

Third Party Communication:

☒ None☐ Yes**Facts of Case**

The firm is a nail care and beauty salon business operation. The firm engaged the worker through an application process to perform nail technician services for the firm's business customers. The firm indicated no formal training was provided and the worker stated that the firm provided training on business policies and procedures. The firm assigned the worker services to perform on a rotational basis via customer appointments or walk-ins. The firm and worker determined the methods used to perform the services. The firm required the worker to contact the firm regarding any problems or complaints for resolution. The firm assigned the worker work schedules and allowed the worker flexibility in when to perform services. The firm required the worker to perform the services at the firm's designated business location. The firm stated the worker was not required to attend any meetings and the worker indicated that she attended firm required meetings. The firm required the worker to perform the services personally. The worker stated the firm hired and paid substitutes or helpers as needed, the firm did not answer this question.

The firm provided equipment, materials, and supplies and the worker provided personal tools of the trade. The worker did not lease equipment or space. The worker did not incur any on-going significant business expenses. The firm paid the worker a guaranteed set amount if worker worked 5 days or commissions. No drawing accounts were allowed. The customers paid the firm or the worker. If the customers paid the worker the entire amount was turned over to the firm. The firm did not carry workers' compensation insurance. The firm determined the level of payment for the services and products. The worker could not suffer any economic loss and had no financial risk.

The firm provided a copy of an unsigned independent contractor agreement and indicated all workers signed them. The agreement indicates a name of individuals who work at the firm's place of business performing specified services as an independent contractor. It indicated the payment terms and conditions of the weekly payments with no taxes withheld from the wages or tips etc. The worker did not perform similar services for others or advertise to the public as being engaged in a business. Both the firm and the worker retained the right to terminate the working relationship at any time without incurring any liability.

Analysis

When a firm determines or retains the right to determine directly or through designation what, how, when, and where workers perform services an employer/employee relationship exists. For federal employment tax purposes, it is not necessary for firms to exert direct or continuous control nor that services be performed full-time on a fixed scheduled basis, it is sufficient that the firm retains the right to change the workers services, as they deem necessary for business purposes. In this case the firm engaged the worker through an application process to perform services on a flexible variable scheduled basis at the firm's designated place of business. The firm assigned the worker schedules to work and customers to service on a rotational basis. The firm provided the worker with business policies and procedures training. The firm required the worker to contact the firm regarding problems or complaints for resolution. The firm and the worker determined the methods used to perform the services. The methods used by workers to perform services are not only controlled through verbal instructions but also by equipment, materials, and supplies provided. The firm required the worker to perform the services personally. The firm hired and paid substitutes or helpers as needed. These facts evidence behavioral control by the firm over the services performed by the worker.

The firm provided the place of business, equipment, and materials needed by the worker to perform the services. The worker provided personal tools of the trade. The worker did not lease equipment or space. The worker did not incur any on-going significant business expenses. The firm paid the worker on a commission basis and guaranteed a set amount per week if the worker worked 5 days per week. The customers paid the firm directly or through the worker. If the customers paid the worker the entire amount except for tips was required to be turned over to the firm. The firm determined the level of payment for the services and products sold. The worker could not suffer any economic loss and had no financial risk with regard to performance of the services for the firm's business operation. These facts evidence financial control by the firm over the services performed by the worker. The opportunity for higher earnings or of gain or loss from a commission arrangement is not considered having control over profit or loss.

There were no signed contracts provided between the firm and the worker. The firm provided a sample contract and indicated all workers sign the contract. The contract addressed the services the worker is being engaged to perform and how the weekly payments would be determined. The agreement indicated no taxes would be withheld and worker would be responsible for taxes owed on the payments and a Form 1099-MISC would be issued at the end of the year. It is noted that whether there is an employment relationship is a question of fact based on the autonomy of the work relationship and is not subject to negotiation between the parties. The worker did not perform similar services for others. The worker did no advertising to the public as being engaged in a business operation. The worker personally performed services for the firm's business customers at the firm's place of business under the firm's business names on a regular continuous variable scheduled basis over several months.

Both the firm and the worker retained the right to terminate the working relationship at any time without incurring any liability. The right to discharge a worker at any time without incurring a liability for termination is a factor indicating that the worker is an employee and the person possessing the right is an employer. An employer exercises control through the threat of dismissal, which causes the worker to obey the employer's instructions. An independent contractor, on the other hand, cannot be fired without a liability so long as the independent contractor produces a result that meets the contract specifications. Likewise, if the worker has the right to end his or her relationship with the person for whom the services are performed at any time he or she wishes without incurring liability, that factor indicates an employer-employee relationship.