IN THE IOWA ADMINISTRATIVE HEARINGS DIVISION
CENTRAL PANEL BUREAU

Thao Nguyen Do, Owner Thao Nguyen Do, LLC. 4511 Ruehmann Ct. Davenport, IA 52806 Appellant, **v.** Iowa Workforce Development, Respondent.	)	Case No. 24IWDM0012 **ADMINISTRATIVE LAW JUDGE DECISION**

STATEMENT OF THE CASE

Thao Nguyen Do, LLC (the Appellant) appealed an October 25, 2023 decision by Iowa Workforce Development (IWD) that an employer-employee relationship existed between the Appellant and workers performing nail technician services for the Appellant's salon. The matter was transmitted by IWD to the Administrative Hearings Division to schedule a contested case hearing. An in-person hearing was conducted on March 5, 2024. Sapto Susilo1 represented and testified for the Appellant. Attorney Jeffrey Koncsol represented IWD. IWD Field Auditor Shamar Hill also appeared and testified for IWD.

Prior to the hearing, IWD submitted exhibits 1-26, which were admitted into the record without objection. IWD proposed exhibit 27 was stricken from the record as untimely.

Appellant's exhibits A and B were admitted without objection. Exhibit C was admitted over the objection of IWD.

ISSUE

Whether an employer-employee relationship existed between Thao Nguyen Do, LLC and workers performing nail services.

1Susilo is Thao Nguyen Do's husband and power-of-attorney. He also helps the salon with financial matters.

FINDINGS OF FACT

General Background

In June 2023, IWD discovered that multiple workers providing services for the Appellant had filed claims for Pandemic Unemployment Assistance (PUA) benefits. Hill opened an investigation to verify the entity's compliance with the Iowa Employment Security Law.2 (Hill Testimony; Exh. 8 at 16).

Hill mailed out an audit notification letter and pre-audit questionnaire to the Appellant and Susilo for the 2019-2022 tax years. The completed documents were received by IWD on July 5, 2023. The pre-audit questionnaire confirmed that the Appellant is the sole owner of the LLC, which operates as a nail salon. The Appellant stated that one employee, who has since left the business, worked on a casual or temporary basis, and that her name was reported on quarterly IWD reports. (Hill Testimony; Exh. 9 at 18-20).

One section of the form asked whether any of the following are provided at the employer's expense:

--expense reimbursement
--company vehicle
--meals
--menu/cafeteria plan
--profit sharing
--lodging
--health insurance plan
--retirement plan
--other

The Appellant indicated that expenses were reimbursed for W2 employees only. None of the other benefits was circled. The Appellant further denied making any deductions from pay, including for retirement or health insurance. The Appellant indicated that she was the only family member who worked for the LLC. (Hill Testimony; Exh. 9 at 21).

On July 19, 2023, Hill mailed and emailed to the Appellant and Susilo a "Services Provided" questionnaire listing the names of workers receiving regular payments from the business between 2019 and 2022. These workers were as follows: Diem Hong Dinh; Cathy Ngoc Tran; Jennifer Hoang; Kim Thanh Le; Men Thi Le; Nhien Thi Yen Nguyen; Phung Tran; Stephanie Hao Nguyen; Thanh Ngo; Thao Vu Nguyen; Vi Le; and Yen Nguyen. The questionnaire asked the type of services performed by each worker; how the business found each worker; how each worker was paid, whether he or she submitted invoices. Gaeta also mailed "Questionnaires to Determine Status of Worker"

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2 *See* Iowa Code Chapter 96 (2023). All future references to the Iowa Code are to the 2023 edition.

to four persons. The completed questionnaires were due by July 26, 2023. (Hill Testimony; Exh. 8 at 17).

The Appellant, through Susilo, returned the completed Services Provided Request on July 25, 2023. The Appellant described each named individual as a "nail tech," other than Yen Nguyen, for whom the Appellant wrote, "fixing pedicure chair." The Appellant wrote "N/A" when asked whether any individual operated through a separate business and/or retained business insurance. The vast majority of workers listed on the form came to the Appellant's business through personal referrals, as opposed to applications, an employment agency or a bidding process. (Hill Testimony; Exh. 10 at 23).

The completed form indicated that each individual listed as a nail tech submitted an "informal, hand written" invoice, and received a share of the client payment as compensation. Yen Nguyen verbally requested payment for his services, and was given a lump sum payment. (Hill Testimony; Exh. 10 at 23).

Susilo also sent Hill sample copies of the form contract the Appellant maintained with each of its nail technicians. The contract is entitled: Agreement to Work as Independent Contractor Instead of Employee (Nail Tech Agreement). The Nail Tech Agreement states in relevant part: "Salon Owner is aware that as an Independent Contractor, Nail Tech may work, anytime & anywhere, and compete with [the Appellant's salon]." The contract also provided:

> Both Nail Tech and Salon Owner agree that:
> 1. Nail Tech bring his/her own tools, or he/she will pay Salon Owner if he/she use Salon Owner's equipment to do the job.
> 2. Nail Tech bring his/her own nail supply, or he/she will pay Salon Owner if he/she use Salon Owner's nail supply.
> 3. Unless it is requested by customer, the time to work on client is based on first available, first serve. Nail Tech may not discriminate customers based on race, age, gender, or his/her prior knowledge about the tips. Neither Nail Tech nor Salon Owner is allowed to overrule these rules.
> 4. Nail Tech is not required to wear uniform, but an apron, mask and gloves are required.
> 5. Nail Tech job is not complete unless the customer says it is complete.
> 6. Nail Tech is not required to submit any written report.
> 7. Nail Tech is not required to attend any meeting.
> 8. Nail Tech is allowed to have a helper or substitute at his/her own expense.
> 9. Nail Tech is required to maintain his/her Nail Technical State License at his/her own expense.
> 10. Nail Tech and Salon Owner share the money received from customer based solely on negotiation between Nail Tech and Salon Owner. The percentage of share is negotiated at least every month. Tips are all Nail Tech's.
> 11. This agreement will be reviewed every month.

(Exh. 17 at 45-47).

On August 4, 2024, Susilo emailed Hill a copy of a hand-written invoice that had been submitted by worker Hong Dinh for Saturday, June 18, 2022. The invoice listed the names of each client presumably served by Dinh, the amount paid by each client, and Dinh's share of the amounts paid. Dinh also signed the invoice. (Hill Testimony; Exh. 18 at 48).

Three people who received a Questionnaire to Determine Status of Worker--Cathy Tran, Vi Le and Men Le--completed and returned the form. Tran described herself as "self-employed" on the form, and added that "[s]he [presumably, the Appellant] can't tell me how I work for my clients." Tran stated that she received work assignments when her customers made appointments. If Trans' services were not satisfactory, she may incur a financial loss, in the form of a refund to the client, repair of damaged nails, supplies and use of her tools. Tran also checked the box to indicate it was her responsibility—rather than the Appellant's--to resolve problems or complaints. Tran denied that the Appellant could discharge her at any time, or that an agreement existed preventing competition between her and the Appellant. (Exh. 11 at 24-28).

Vi Le and Men Le provided similar responses—each describing him/herself as "self-employed, and stating they could work "anywhere, any time." Each also denied that the Appellant could direct how they served their clients. Each also indicated work assignments originated through client appointments, and stated any problems would be resolved directly with the clients themselves. (Exhs. 12-13 at 29-38).

Susilo subsequently provided requested bank statements. He also indicated that the business now considers all of its nail technicians to be employees. Accordingly, the Appellant reports W2 wages to the State of Iowa, and has begun paying benefits. (Hill Testimony; Exh. 8 at 17).

Based on the documents received, along with his own search of state databases and the internet, Hill determined all workers listed on the Questionnaire to Determine Status of Worker, other than Thao Vu Nguyen3 and Yen Nguyen, were employees during the years at issue. Hill found no online evidence that any operated an independent business, such as a business site and/or advertising. None had contractor's registrations, identifiable business insurance, unemployment insurance accounts or had registered with the Iowa Secretary of State. According to Hill, although the contract in place between the Appellant and each worker showed some flexibility, the fact the worker's services were usual and necessary for the business outweighed this flexibility. The Appellant also paid each worker on a regular, bi-weekly basis. (Hill Testimony; Exh. 8 at 18).

On August 4, 2023, Hill emailed to the Appellant a post audit letter listing the individuals found to be employees. The letter indicated that if the Appellant had additional evidence tending to show the workers at issue should instead be classified as

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3 Yen Nguyen is distinguished based on the fact he is not a nail technician, but in fact repaired one of the customer chairs. It is not clear, however, why Hill distinguished Thao Vu Nguyen from the other nail technicians.

independent contractors, he should submit the information no later than August 11, 2023. (Hill Testimony; Exh. 14).

On August 6, 2023, Susilo emailed to Hill a list of disagreements with IWD's findings, again emphasizing that the Appellant discontinued the use of "1099 relationships" in July 2022. Susilo explained that the business maintained subcontractor relationships only because they were commonly-used by other salons in the area at that time. (Exhs. 20-23 at 57-68).

Hill was not persuaded by Susilo's argument. On October 25, 2023, IWD issued its Unemployment Insurance Tax Audit Results showing amounts owed due to employee misclassification. The Appellant submitted a timely appeal thereafter. (Hill Testimony; IWD Exhs. 6, 7).

Susilo testified during the hearing that, during the audit years at issue, all of the individuals identified in IWD's audit as employees worked independently of the Appellant's business. Each preferred to receive an Internal Revenue Service (IRS) Form 1099 at year-end instead of a W-2 form. (Susilo Testimony).

When asked to describe the business operations,4 Susilo stated that the majority of customers contacted their nail technicians directly to make an appointment. Walk-ins were assigned on a first-available basis. Under the Nail Tech Agreement, each worker was entitled to set his/her own hours, and received no paid benefits or time off. Each also was required to provide his/her own equipment and products. If a customer was not happy for any reason, the nail technician was responsible for resolving the issue, whether by repairing a nail, re-doing the entire manicure or pedicure, or arranging for a refund. The nail technician therefore incurred a risk of loss with each client encounter. (Susilo Testimony).

The contract between the Appellant and each nail technician also allowed the technician to bring a "helper," at the technician's own expense. Each nail technician negotiated a separate payment, or "share," arrangement that was reviewed at least every month. Although the nail technician could not refuse to work on a particular client, Susilo explained that the basis for this restriction was to prevent unlawful discrimination—not control the technician's work. (Susilo Testimony).

Susilo emphasized that the nail technicians—not the Appellant—chose to work as subcontractors. He and his wife both preferred to maintain employer-employee relationships, and now operate under this latter arrangement. Susilo stated, however, that during the time period at issue, he familiarized himself with Iowa law on independent contractor relationships, and attempted to abide by the law in all respects. (Susilo Testimony).

4 Again, these are the procedures in place during the audit years at issue.

CONCLUSIONS OF LAW

For purposes of unemployment compensation, the term "employer" is defined under Iowa law as an employing unit that, in any calendar quarter in the current or preceding calendar year, paid wages of $1,500 or more, or employed at least one individual for some portion of a day in each of twenty different calendar weeks during the current or preceding calendar year.[5] "Employment" is defined as service performed for wages or under any contract of hire, written or oral, express or implied.[6] An employer claiming that any employment is not "employment" under the Iowa Employment Security Law, bears the burden to prove the exemption claimed.[7]

In the unemployment compensation context, it is well-settled that "the right to control the manner and means of performance is the principal test in determining whether a worker is an employee or independent contractor."[8]

> The relationship of employer and employee exists when the person for whom services are performed has the right to control and direct the individual who performs the services, not only as to the result to be accomplished by the work but also as to the details and means by which that result is accomplished. An employee is subject to the will and control of the employer not only as to what shall be done but how it shall be done. It is not necessary that the employer actually direct or control the manner in which the services are performed; it is sufficient if the employer has the right to do so.[9]

The Department's regulations outline several factors to be considered in determining whether a worker is an employee or an independent contractor.[10] Factors that support the existence of an employer-employee relationship include:

> --Right to discharge an employee without being held liable for damages for breach of contract;

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5 Iowa Code § 96.1A(16)(a) (2021). An employing unit paying wages exclusively for domestic service is excluded from this definition. *Id.*
6 Iowa Code § 96.1A(18)(a) (2021).
7 Iowa Admin. Code r. 871-22.7(3), 23.55(2). During her closing argument, Cramer argued that placing the burden of proof on the employer rather than IWD is unconstitutional. An administrative law judge lacks authority to consider constitutional challenges in this proceeding. *See, e.g., Endress v. Iowa Dep't of Human Servs.*, 944 N.W.2d 71, 83 (Iowa 2020) (citing *Soo Line R.R. v. Iowa Dep't of Transp.*, 521 N.W. 2d 685, 688 (Iowa 1994)). Regardless, Cramer's argument was considered and rejected by the District Court in *Contreras Roofing v. IWD.*, CVCV064796 (Iowa Dist. Ct. for Polk Cty., Oct. 3, 2023).
8 *Gaffney v. Department of Employment Services*, 540 N.W.2d 430, 434 (Iowa 1995) (citations omitted).
9 871-23.19(1).
10 *See gen.* 871-23.19.

--Furnishing of tools, equipment, material, and a place to work;
--Continuous performance of work for the employer;
--Payment of a fixed wage on a weekly or hourly basis.

Factors that support an independent contractor relationship include:

--Performance of a specific job at a fixed price;
--Following a distinct trade, occupation, business, or profession in which an individual offers services to the public to be performed without the control of those seeking the benefit of his or her training or experience;
--Unreimbursed expenses and fixed, ongoing costs regardless of whether work is currently being performed;
--Significant investment in real or personal property that is used in performing services for someone else;
--Right to employ assistants with the exclusive right to supervise their activity and completely delegate the work.[11]

The regulations also provide that if, upon examination of the facts of a case, an employer-employee relationship is found to exist, the parties' own designation or description of the relationship is immaterial.[12]

Viewing the evidence as a whole, the undersigned concludes Thao Nguyen Do, LLC. has met its burden to prove that the nail technicians identified in IWD's October 25, 2023 Audit Result Letter operated as independent contractors during the time period at issue, and not as employees. In particular, the Appellant entered into written contracts with each technician in which the Appellant expressly disavowed the ability to control the technician's work, emphasizing that the technician "may work, anytime & anywhere, and compete with [the business]."13 (Exh. 17).

Each nail technician provided his/her own tools and supplies, and would reimburse the Appellant in the event he/she needed to borrow the Appellant's supplies. The technicians also incurred a risk of loss from each client interaction, and were responsible for fixing a damaged nail or re-doing an entire manicure or pedicure at his or her own expense.14

The Appellant paid each worker an independently-negotiated percentage of each client payment—not an hourly wage. Each nail technician submitted an informal, written invoice to collect his or her compensation. Although it would have been helpful if the

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11 *Id.*
12 871-23.19(7).
13 *See Gaffney*, 540 N.W.2d at 434 (right to control "manner and means of performance" is principal test to determine whether worker is an employee); *see also* 871-23.19(1) (with employer/employee relationship employer has the right to control and direct "details and means by which that result is accomplished."

14 871-23.19(3).

Appellant had maintained a more formal invoicing system, such formality is not required under the law. When balanced against these factors, the Appellant's practice of paying each technician on a regular, bi-weekly basis is not controlling.15

The Appellant and Susilo completed the pre-audit questionnaire and services provided list, and attempted in good faith to provide all requested information. Susilo's credible hearing testimony then confirmed that the manner of operation between the Appellant and each nail technician more closely resembled that of a business and its independent contractors than an employer/employee relationship.

ORDER

IWD's October 25, 2023 decision that an employer-employee relationship existed between the individuals identified during the audit is **REVERSED**.

Dated this 27th day of March, 2024.

cc:
Thao Nguyen Do, Appellant (By mail)
Sapto Susilo, Power of Attorney (By AEDMS)
Shamar Hill, IWD (by AEDMS)
Jeffrey Koncsol, IWD (By AEDMS)
Stephanie Goods, IWD (By AEDMS)

APPEAL RIGHTS

This decision constitutes final agency action.

Any party may file with the presiding officer a written application for rehearing within 20 days after the issuance of the decision. A request for rehearing is deemed denied unless the presiding officer grants the rehearing request within 20 days after its filing.

Any party may file a petition for judicial review in the Iowa district court within 30 days after the issuance of the decision or within 30 days after the denial of the request for rehearing. *See* Iowa Admin. Code r. 871-26.17(5).

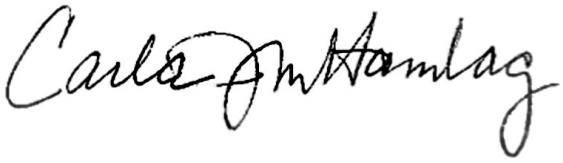
15 Id. at 23.19(4).

Case Title: THAO NGUYEN DO, LLC V. IOWA WORKFORCE DEVELOPMENT

Case Number: 24IWDM0012

Type: Proposed Decision

IT IS SO ORDERED.



Carla Hamborg, Administrative Law Judge