IN THE IOWA ADMINISTRATIVE HEARINGS DIVISION
CENTRAL PANEL BUREAU

Hong An Inc. c/o Community CPA & Associates, Inc. 3816 Ingersoll Ave. Des Moines, IA 50312, Appellant, v. Iowa Workforce Development, Respondent.	))))))))))))	Case No. 24IWDM0025 **ADMINISTRATIVE LAW JUDGE DECISION**

STATEMENT OF THE CASE

Iowa Workforce Development ("IWD") completed an investigation and determined that an employer-employee relationship existed between Hong An Inc., d/b/a A-Plus Nails ("Hong An" or "Appellant"), and its workers. Hong An appealed IWD's determination. IWD transferred the case to the Department of Inspections, Appeals and Licensing (DIAL) to schedule a contested case hearing. A telephone hearing was held on August 16, 2024. Hong An was represented by Ying Sa, managing partner of Community CPA and Associates. Hong Le, the owner of Hong An Inc., and Andy Le, a nail technician at A Plus Nails, testified at hearing. Jeffrey Koncsol represented IWD. IWD employer auditor Edvonna Pack appeared and testified. IWD exhibits 1-18 and Appellant exhibits 1-4 were admitted as evidence.

ISSUE

Whether an employer-employee relationship existed between Hong An Inc. d/b/a A-Plus Nails, and workers performing services for Hong An Inc. d/b/a A Plus Nails.

FINDINGS OF FACT

In December 2023, IWD discovered that workers providing services for the Appellant had filed claims for Pandemic Unemployment Assistance (PUA) benefits. Field Auditor Edvonna Pack opened an investigation to verify the entity's compliance with the Iowa Employment Security Law.[1]

Pack mailed out an audit notification letter and pre-audit questionnaire to the Appellant for the 2019-2022 tax years. The pre-audit questionnaire was completed on February 5, 2024, by Hong Le, the owner of A-Plus Nails, and his accountant at Community CPA and

[1] *See* Iowa Code Chapter 96.

Associates Inc. The pre-audit questionnaire confirmed that Hong Le is the sole owner of Hong An Inc., which operates as a nail salon. The form indicated the business is an S corporation. The Appellant stated the business has some independent contractors who are not issued 1099 forms, but provided no further explanation. The Appellant reported that tipping is customary in the nail salon business, and that tips are paid directly to the 1099 workers.

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, or other expenses. The Appellant indicated that none of these items applied to the business. The Appellant further marked that the business does not take any deductions from pay, including for retirement, health/disability insurance, menu/cafeteria plan, dependent care, flexible spending, or other deductions from pay.

On April 3, 2024, Auditor Pack mailed and emailed to the Appellant a "Services Provided" questionnaire listing the names of workers receiving regular payments from the business between 2019 and 2022. The form listed a total of 21 workers. The questionnaire asked the type of services performed by each worker; how the business found each worker; how each worker was paid, and whether he or she submitted invoices. Pack also mailed "Questionnaires to Determine Status of Worker" to five workers. The completed questionnaires were due by April 16, 2024. No questionnaires were returned.

The Appellant returned the completed Services Provided Request on April 12, 2024. The Appellant described each named individual as a "nail technician." The Appellant wrote "N/A" when asked whether any individual operated through a separate business or retained business insurance. All the workers listed came to the business through referrals, as opposed to applications, an employment agency or a bidding process. The Appellant indicated the listed workers do not invoice the business, but that they are paid by "job/customer." The Appellant also indicated each listed worker paid rent or had a contract.

The Appellant provided Auditor Pack with a "Rental and Service Agreement" signed by five workers. The effective date of the agreements had different effective dates, with at least one dating back to 2016.[2] All agreements, however, were signed in April 2024, after the IWD audit started. In the agreement, the worker is referred to as a Nail Technician. The relevant provisions of the agreement state:

> II. Rent. The Company shall lease to Nail Technician and Nail Technician shall rent from the Company a nail service station on the Premises on a daily basis, and Nail Technician shall be liable for each rental day's daily rent that is the higher of $15 and 40% of Nail Technician's service revenue during the rental day. The Company shall provide at the Company's sole expense shared utilities, nail service supplies, and other items customarily necessary for Nail

[2] The effective dates of the five rental agreements received were November 2016, February 2018, January 2019, February 2021, and August 2022.

> Technician to provide nail services. The lease agreement shall begin on ______ and the Parties shall mutually agree on each rental day prior to the Salon's opening time of each day.
>
> III. Services Provided. Nail Technician shall provide nail services to customers on the leased station during the hours the Premises is open to public. The Company shall issue 1099 form to Nail Technician at each yearend for Nail Technician's service revenues processed through the Company's payment system, excluding the rent amount (defined in Section II) deducted.
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> IV. Taxes and Insurance. Each party shall be responsible for the reporting and payment of its own incomes taxes, payroll taxes and other applicable taxes, and each party shall be responsible for securing and payment of business liability and other applicable insurance policies.
>
> V. Certificate of Licenses. The Company shall ensure the Premises is permitted for nail services on the Premises including a valid nail salon license; Nail Technician shall at all time during the lease term be required to hold a valid nail technician license.

The Appellant provided copies of nine checks paid to different workers in year 2019. The amount of payments varied.

Based on the documents received, along with her own search of state databases and the internet, Pack determined all 19 workers listed on the "services provided" form were employees during the years at issue. Pack found no online evidence that any of the nail technicians operated an independent business, such as a business site and/or advertising, or holding their services out to the public as independent contractors. Further, none had contractor's registrations, identifiable business insurance, unemployment insurance accounts or had registered with the Iowa Secretary of State. The business made payments to individuals, not businesses. The information also showed the workers had a continuous relationship with the employer, sometimes spanning over several years.

Pack considered the rental agreements provided for five of the nail technicians. Of initial note, Pack found that the agreements were not signed until April 2024, after the IWD audit started, even though some of the nail technicians had been with the salon for years prior. Under the agreement, the nail technicians were liable for $15 a day or 40 percent of their daily revenue, whichever was greater. Pack found it critical to note there was an absence of documented evidence related to tracking revenue or rental payments. Per the agreement, the salon is required to provide at its sole expense share utilities, nails service supplies, and other items customarily necessary for the nail technician to offer nail services. Pack found this did not indicate an independent contractor relationship as contractors often invest significantly in real or personal property to perform services for someone else. Independent contractors are also typically responsible for selecting materials based on their skills and comfort level.

The agreement also provided that nail technicians shall provide services on the leased nail station during the hours the salon is open to the public. The salon business hours are Monday to Friday 10AM to 8PM, Saturday 10AM to 6PM, and Sunday 10AM to 5PM. Pack found this provision relevant as the relationship between 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. Per the agreement, the company was controlling the hours the nail technicians can provide services. Further, Pack found the evidence showed the company set the prices for nail services. No evidence existed that the nail technicians could set their own prices, even though independent contractors typically negotiate their own prices based on expertise and cost. The agreement also directs that each party is responsible for business liability and other applicable insurance policies. Pack, however, did not find any evidence of the technicians having insurance policies.

On May 1, 2024, IWD issued its Unemployment Insurance Tax Audit Results showing amounts owed due to employee misclassification. The audit results letter indicated Auditor Pack relied on the following factors in determining the workers were employees:

- Degree of Business Integration indicates an employer/employee relationship.
  - The workers performed duties in the regular service of the employer, and the work performed was necessary for the business. The work was performed under the name of the employer.
- Lack of Investment in business or facilities indicates an employer/employee relationship.
  - The workers did not have a significant financial investment in the business.
  - The workers did not have business insurance or workers' compensation insurance for the work they performed.
- Furnishing tools and materials by the employer indicates an employer/employee relationship.
  - The employer provided tools such as pedicure station, chair and tables.
- Set hours of work indicates an employer/employee relationship.
  - The workers are given a schedule of hours to work.
  - The workers are only able to work during the store hours the employer sets.
- Work done on employer's premises indicates an employer/employee relationship.
  - The work is done at the employer's business location.
  - The workers were required to provide their services personally.
- A continuing relationship indicates an employer/employee relationship.
  - The workers worked continuously for several months and years at a time.
  - The workers did not invoice the business for their work.
  - The workers did not advertise their services to the general public.
  - The workers were paid for personal services rendered.

- The workers devoted substantially full-time hours to this employer.
- Services Rendered Personally indicates an employer/employee relationship.

The Appellant submitted a timely appeal thereafter. In its written appeal, the Appellant stated the rental agreement governed the work relationship between the salon and nail technicians. Even though the agreements were not signed until April 2024, the Appellant argued the terms of the agreement were verbally communicated and understood by the nail technicians, and that is how the parties operated. The Appellant argued the salon rented to the nail technicians a nail station and drawers, which the technicians could use for their own tools and supplies. The Appellant also argued the nail technicians set their own appointments. The Appellant contended the salon does not have the right to direct or control the work of the nail technicians. Instead, the nail technicians engage in the independent trade of providing nail services to the public, and are responsible for maintaining their own trade licenses.

Hong Le, the owner of the business, testified at the hearing. He explained his wife Julie works as the salon manager, which a salaried position. The salon currently has five nail technicians. Hong testified the nail technicians operate as and understand they are independent contractors. The salon finds nail technicians through word of mouth. At the initial meeting with a new nail technician, the salon verifies their license is active and explains the rental agreement. Hong testified all technicians are provided a written copy of the agreement, although not all of them sign it. However, both parties understand the rental arrangement. The salon rents a nail station to each technician. Nail technicians provide their own tools. The salon sets the prices. A nail technician is paid 60 percent of their daily revenue. Nail technicians are customarily tipped, but the salon does not track or deduct from the tips. Nail technicians do not have any dress code requirements.

Julie is at the salon during the hours of operation. Customers can schedule appointments online or by calling the salon. Some customers may contact the nail technician directly if they have their direct contact information. Hong testified nail technicians are able to use the salon after hours. Julie works with available nail technicians when making appointments during salon hours. The nail technicians decide when and how many hours to work. The salon does not require a nail technician to accept appointments, including walk-in appointments. If a technician does not show up to a scheduled appointment, the salon will ask other available technicians if they want to take the appointment. Hong testified he does not know whether the nail technicians work for other business, but they are not prohibited from doing so. Further, if a nail technician wished to bring an assistant to the salon, they are allowed to do so. Julie tracks the daily information, including the technicians providing her with a list of services they provided that day. This daily accounting is used to calculate how much the salon needs to pay the nail technician.

Andy Le, a nail technician at A Plus Nails since January 2019, also testified at hearing. Andy explained that he rents his nail station. He acknowledged having a rental agreement with the salon. The nail station has a daily rental fee. Andy testified he pays the salon 40 percent of his daily service revenue for the station. The salon sets the basic prices for the services on the menu. But if a customer wants a special design or a service not on the menu, Andy testified he can provide it and set the price for it. He would pay the salon 40 percent of the price he set for the services. Andy tracks what services he provides on a daily basis and at the end of the day communicates that information to the owner. He is paid weekly for the services provided.

Andy testified that he sets his own hours. He comes into the salon for his appointments, and has the ability to leave when he chooses or decide not to work a day at all. He does not have any repercussions from the salon for the hours he chooses to work or not work. Andy testified he has the ability to refuse appointments, including walk-in clients, if he does not wish to work those hours. He does not have any paid breaks. Andy testified he has the ability to work at other salons, but chooses not to. The salon does not have a dress code or require him to dress a certain way. If there is an issue with a service a nail technician provides, it is up to the nail technician to fix the issue.

Andy testified he maintains his own station, including purchasing and bringing in his own tools, such as trimmer, buffer and supplies, that he does not share with other technicians. He chooses which tools and supplies he wants to use at the salon. The salon provides some basic supplies, like nail polish, but the nail technicians provide other supplies or special designs they want to make available to their clients. The salon does not provide any reimbursement for tools or supplies. Andy testified he retains his own licensure and pays for the license renewals. Andy further testified that he considers himself an independent contractor for the salon. He files taxes as a business from the 1099s issued by the salon.

CONCLUSIONS OF LAW AND ANALYSIS

IWD oversees the unemployment compensation fund in Iowa, which is governed by Iowa Code chapter 96.[3] IWD's Director administers Iowa Code chapter 96 and is charged with adopting administrative rules.[4] IWD has adopted rules found at 871 IAC chapter 23.

IWD initially determines all issues related to liability of an employing unit or employer, including the amount of contribution, the contribution rate, and successorship.[5] Services performed by an individual for remuneration are presumed to be employment, unless proven otherwise.[6] An individual or business bears the burden of proving the individual or business is exempt from coverage under Iowa Code chapter 96.[7] If an employer-employee relationship exists, the designation or description of the relationship by the parties as anything other than an employer-employee relationship is immaterial.[8]

An employer is defined as "any employing unit which in any calendar quarter in either the current or preceding calendar year paid wages for service in employment."[9] An employing unit includes any individual or organization that has in its employ one or more individuals

3 Iowa Code § 96.9(1).
4 *Id.* § 96.11(1).
5 *Id.* § 96.7(4).
6 871 Iowa Administrative Code (IAC) 23.19(6).
7 Iowa Code § 96.19(18)*f*; *Id.* § 22.7(3).
8 871 IAC 22.19(7).
9 Iowa Code § 96.19(16)*a*.

performing services for it in Iowa.[10] The term "employment" is defined as service "performed for wages or under any contract of hire, written or oral, express or implied."[11] Employment includes service performed by "[a]ny individual who, under the usual common law rules applicable in determining the employer-employee relationship, has the status of an employee."[12]

Whether a person is an independent contractor or an employee is a "'factual determination based on the nature of the working relationship and many other circumstances, not necessarily on any label used to identify the parties in the contract.'"[13] In other words, if the relationship of employer and employee exists, the parties' designation or description of the worker as an independent contractor is immaterial and of no consequence.

The right of control, as developed through the common law, is the principal test for determining whether a worker is an employee or independent contractor in the unemployment context.[14] Whether an employer-employee relationship exists under the usual common law rules is determined based upon an analysis of the individual facts in each case.[15] IWD has also adopted a number of rules with factors to consider in determining whether a worker is an independent contractor or employee.[16]

Under IWD's rules,

> 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.[17]

The right to discharge or terminate a relationship is "an important factor indicating that the person possessing that right is an employer."[18] If the discharging party may be liable for damages for breach of contract, the circumstances are indicative of an independent contractor relationship.[19]

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[10] *Id.* § 96.19(17).
[11] *Id.* § 96.19(18)*a*.
[12] *Id.* § 96.19(18)*a*(2).
[13] *Pennsylvania Life Ins. Co. v. Simoni,* 641 N.W.2d 807, 813 (Iowa 2002) (quoting *Harvey v. Care Initiatives, Inc.,* 634 N.W.2d 681, 684 n. 2 (Iowa 2001)).
[14] *Gaffney v. Dep't of Employ. Servs.*, 540 N.W.2d 430, 434 (Iowa 1995).
[15] 871 IAC 23.19(6).
[16] *Id.* 23.19.
[17] *Id.* 23.19(1).
[18] *Id.*
[19] *Id.*

The furnishing of tools, equipment, materials, and place to work to the individual who performs the service are characteristic of an employer.[20] "In general, if an individual is subject to the control or direction of another merely as to the result to be accomplished by the work and not as to the means and methods for accomplishing the result, that individual is an independent contractor."[21]

Another factor includes the nature of the worker's contract for the performance of a certain type, kind or piece of work at a fixed price.[22] Generally an employee performs the work continuously and his or her labor is primarily purchased, whereas an independent contractor undertakes the performance of a specific job.[23] An employee is typically paid a fixed wage on a weekly or hourly basis, whereas an independent contractor is typically paid one sum for the entire work, whether it is paid in a lump sum or installments.[24]

Independent contractors can make a profit or loss and are more likely to have unreimbursed expenses than employees and to have fixed, ongoing costs regardless of whether work is currently being performed.[25] Independent contractors often have significant investment in real or personal property that they use in performing services for others.[26] Independent contractors have the right to employ assistants with the exclusive right to supervise their activity and completely delegate work.[27]

An independent contractor follows a distinct trade, occupation, business or profession in which the worker offers his or her services to the public to be performed without the control of those seeking the benefit of the worker's training or experience.[28] Individuals such as physicians, lawyers, dentists, veterinarians, construction contractors, public stenographers, and auctioneers, engaged in the pursuit of an independent trade, occupation, business, or profession, in which they offer services to the public, are independent contractors and not employees.[29] Professional employees who perform services for another individual or business are covered employees.[30]

Viewing the evidence as a whole, the undersigned concludes Hong An Inc., has met its burden to prove that the nail technicians identified in IWD's May 1, 2024 Audit Result Letter operated as independent contractors, not as employees, during the time period at issue.

The rental agreement states that the nail technicians rent a nail service station in exchange for $15 daily, or 40 percent of services provided, whichever is greater. The undersigned notes the agreements were not signed until after the audit stated, but credits

[20] *Id.*
[21] *Id.*
[22] *Id.* 23.19(2).
[23] *Id.*
[24] *Id.* 23.19(4).
[25] *Id.* 23.19(3).
[26] *Id.*
[27] *Id.* 23.19(5).
[28] *Id.* 23.19(2).
[29] *Id.* 23.19(1).
[30] *Id.*

the sworn testimony of Hong Le and Andy Le, both of whom corroborated the existence of a rental relationship between the salon and the nail technicians. Their testimony also corroborated that the nail technicians control their hours and whether to accept appointments. The salon has no ability to require a nail technician to come into the salon or to stay certain hours to provide a service. The written agreement states the nail technicians are to provide services during salon hours. However, the testimony at hearing indicated the technicians have the ability to work outside of salon hours. The agreement also indicated the services are to be provided on the leased stations. While this may suggest control of the technician's work, *i.e.* they must provide services at the salon only, the undersigned interprets the provision as explaining that the work performed under *this* rental agreement must be performed at the rented nail station. This provision does not prohibit the nail technician from providing services at other salons or acceptable places, as those are entirely outside of the scope of the rental agreement between Hong An Inc. and the nail technician.

In terms of payments and expenses, the evidence shows the salon sets the basic service prices. The nail technicians know the basic prices and have accepted them by entering into the agreement with the salon. As Andy testified, however, a nail technician can provide special services for an upcharge or provide additional services not on the salon menu for which he would set the price. The salon would still receive 40 percent of the price set, but he had the ability to charge the client a price he deemed appropriate without salon approval. If a customer was unsatisfied with the work of a nail technician, the nail technician is required to fix the unsatisfactory work at their own expense. The testimony at hearing indicated the salon provided to the technicians with basic supplies. Andy testified that he purchases his others supplies (trimmers, buffers) without reimbursement. He also purchases any special designs he wants to make available to his clients. To receive payment, each nail technician submitted their daily services provided to the salon owner to collect his or her compensation. Although it would have been helpful if the Appellant had maintained a more formal invoicing system, such formality is not required under the law.

Upon review and consideration of the evidence presented, the undersigned finds that the manner of operation between the Appellant and the nail technicians more closely resembled that of a business and its independent contractors than an employer/employee relationship. Accordingly, IWD's decision must be reversed.

DECISION

IWD's decision is REVERSED. IWD shall take any further action necessary to implement this decision.

cc: Hong An Inc., c/o Community CPA & Associates, Inc., 3816 Ingersoll Ave., Des Moines, IA 50312, khwan@communitycpa.com, (by Mail and email)
Hong Le, 7655 Aspen Dr., West Des Moines, IA 50266, hongle96@yahoo.com (By Mail and email)
Jeffrey Koncsol, Lisa Gaeta, Stephanie Goods, Edvonna Pack, Deborah Pendleton, VuVo, Charles Mercer, Roxana Devine, Shamar Hill, 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.[31]

[31] IAC 871—26.17(5)

Case Title: HONG AN INC V. IOWA WORKFORCE DEVELOPMENT

Case Number: 24IWDM0025

Type: Final Decision

IT IS SO ORDERED.

Jasmina Sarajlija, Administrative Law Judge