

Keeping a Barber Shop Open on Shabbos

Reuven owns a barber shop that employs gentile barbers. Although the barber shop is closed on Shabbos, during the winter the shop remains open until 6:00 p.m. which is already Shabbos. Additionally, the barber shop remains open on Yom Tov. Is there a way to structure the business to allow the barber shop to remain open after Shabbos begins on Friday night and on Yom Tov?

The first point that must be clarified is whether the gentile barbers are paid hourly or whether they are paid a percentage of each haircut that they perform (or a combination of the two). If the gentiles are paid an hourly rate, i.e., a *sechir yom*, it is prohibited¹. However, if the barbers are paid a percentage of each haircut, there is room for leniency. When an employee is paid a percentage of the profits for the work that he does, he is categorized as an *aris* (Lit. a sharecropper)². Generally, a Jewish employer is permitted to allow an *aris* to work on Shabbos. The reason is that the prohibition of *amirah la'akum* prohibits instructing a gentile to perform *melachah* on Shabbos. When the gentile is motivated out of self-interest (called *אדעתיה דנפשיה*), the prohibition of *amirah la'akum* is not violated. The fact that the Jewish employer will benefit from the gentile's work is irrelevant since that benefit is secondary and the gentile's primary motivation is for his personal benefit³.

The next point that must be addressed is whether the Jewish owner is permitted to require the gentile barbers to work hours on Shabbos night and Yom Tov. Although a *kablan* is permitted to perform *melachah* on Shabbos since his motivation is self-serving, his employer may not, however, instruct him, whether explicitly⁴ or implicitly⁵ to work on Shabbos. Instructing a *kablan* to work on Shabbos is called *קובע מלאכתו בשבת* – scheduling work on Shabbos.

Interestingly, there is a debate whether this restriction applies to an *aris*. The Avnei Nezer⁶ rules that the restriction of *קובע מלאכתו* is limited to a *kablan* and does not apply to an *aris*. The rationale for the distinction relates to the different relationships between a Jew and a gentile *kablan* and a Jew and a gentile *aris*. Although a *kablan* works *אדעתיה דנפשיה*, out of his own self-interest, nevertheless, he is an employee and if he is instructed to work on Shabbos he is doing so as an agent for his Jewish employer. In

¹ Shulchan Aruch HaRav 243:4 and M.B. 252:23

² See Commerce and Shabbos pg. 28 note 32 where he differentiates between a *kablan* and an *aris*.

³ O.C. 245:4.

⁴ O.C. 245:5 and 247:1 where Shulchan Aruch states explicitly that one may not instruct a *kablan* to work on Shabbos.

⁵ M.B. 245:21 writes that if a Jew gives merchandise to a gentile to sell and market day is Shabbos, it is considered as though the Jew instructed him to sell the merchandise on Shabbos since that is the only day it is possible to sell the merchandise.

⁶ O.C. 41

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contrast, an *aris* is not an employee, he is a partner in the business and thus when he works on Shabbos, even if the Jew instructed him to do so, he remains independent and does not act as an agent of the Jew. According to the Avnei Nezer, if the gentile barbers are paid a percentage of the money that is collected from each customer, it is permitted for the Jewish owner to require the barbers to work on Shabbos night and Yom Tov.

However, other *Poskim*⁷ disagree and contend that the restriction of *קובע מלאכתו* applies even to an *aris*. One of the *Poskim* who rules that one may not instruct an *aris* to work on Shabbos is the Mishnah Berurah⁸. Shulchan Aruch⁹ rules that one may give money to a gentile to use for buying and selling if they will share the profits (*arisus*). Mishnah Berurah notes, however, that this allowance does not allow the Jew to instruct the gentile to work on Shabbos. The allowance is limited to where the gentile decides of his own volition to work on Shabbos. Accordingly, in normal conditions we would endeavor to comply with the view of the Mishnah Berurah and the owner of the barbershop may not require his gentile barbers to work on Shabbos or Yom Tov.

We contacted the owner of the barbershop and inquired whether the barbers are penalized in any way if they decide to not work and the barber assured us that there is no penalty. The barbers simply will not earn any money on those days or hours that they do not work. Accordingly, the issue of *קובע מלאכתו* is avoided because the owner does not mandate that the gentile barbers work on Shabbos night or Yom Tov and when they decide to work, it is of their own volition to earn more money – *אדעתא דנפשיה*.

In summary since the gentile barbers are *arisim* and are not instructed to work on Shabbos or Yom Tov, it is permitted for the owner to allow them to work on Shabbos and Yom Tov. There is, however, another consideration that must be considered. Since the barber shop is located in a Jewish populated area and people in the community are aware that a Jew owns the barber shop, perhaps it is prohibited to remain open since people may not realize that the barbers are *arisim* and may think that they are paid hourly – *sechir yom* – and if that were the case, it would be prohibited for them to work on Shabbos. Are there grounds for such a concern?

Shulchan Aruch¹⁰ differentiates between leasing a bathhouse to a gentile and leasing a farm to a gentile. Technically it should be permitted to lease a bathhouse to a gentile because the Jew does not profit from *melacha* done on Shabbos since he is paid a fixed amount for the lease, and the Jew does not instruct the gentile to work on Shabbos (that decision is subject to the gentile's discretion). Nevertheless, it is prohibited. The reason

⁷ Shulchan Aruch HaRav 243:7

⁸ M.B. 245:18

⁹ 245:4

¹⁰ 243:1

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is because of *maris ayin* – the appearance of impropriety since in most instances bathhouse owners pay their employees an hourly wage and *sechirei yom* may not work on Shabbos. Although it is possible to hire employees as *kablanim* or even lease it to them and share the profits – *aris* – since these are uncommon practices, people will assume the worst and thus even though this owner took proper steps to allow the employees to work on Shabbos, it has the appearance of impropriety and thus is prohibited.

In contrast, it is common to lease a farm to a gentile farmer as an *aris* and thus even if one hired an employee as a *kablan* rather than an *aris* it is permitted to allow the *kablan* to work since it is reasonable for people will assume the person working is an *aris* rather than a *sechir yom*.

The Biur Halacha¹¹ inquires about the parameters of this *halacha*. How common must cases of *aribus* be to avoid *maris ayin* restrictions? The Rosh writes that when the majority of cases involve *aribus*, there is no concern for *maris ayin* but if the breakdown of *aribus* vs. *sechir yom* is 50/50, *maris ayin* is a concern. On the other hand, one could argue, as does the Ran, it is only when it is unreasonable to think that someone leased the business to a gentile is it prohibited. For example, running a bathhouse has significant expenses and the profit margin is relatively small. For that reason it is not financially sound to lease the bathhouse operations to a gentile since there is not enough profit for the Jew and gentile to share. In those industries where it is financially reasonable to lease the business to a gentile, it is permitted since people will give the Jewish owner the benefit of the doubt, even if only 50% of business owners lease the business to others.

The Biur Halacha seems to subscribe to the Rosh's stringent position since the Rambam's wording also seems to adopt the position that to avoid *maris ayin* more than 50% of the businesses have to lease their businesses to a gentile. Accordingly, before permitting the barbershop to remain open, it would have to be determined whether most barbers are hired as *kablanim* and when people see the gentile barbers working on Shabbos, they will assume that they are paid as *kablonim* or whether most barbers are paid an hourly rate, in which case, even though this owner hired his barbers as *aribusim*, it is prohibited for the business to remain open because of *maris ayin*.

¹¹ 243:1:d.h. *shekein*