

**SS-8 Determination—Determination for Public Inspection**

Occupation 03MIS.45 MiscLaborServices	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**

Information provided indicates the firm is a wellness center that offers, acupuncture, chiropractic care, naturopathic medicine and massage therapy services. The worker was engaged as a Certified Massage Therapist for tax years 2013, 2014 and 2015. The firm reported the income on Form 1099-MISC. The firm maintains they hold no control over the work performed. No instructions were given as to how she was to perform her services. The worker indicated which days she was available to perform services, the firm then books in clients based on their availability. The firm indicated stated services were performed at the firm’s premises 75% of the time, ██████████ 20% of the time and at the customer location 5% of the time. The firm indicated it was up to the therapist if they notated the services performed per client. The firm indicted they provided the office space, massage table, linens and lotions. The worker provided her own massage tools, such as bars, essential oils, their hands etc. The firm stated the worker did not lease equipment or space. The firm indicated the worker was paid on a commission basis (the Schedule A indicated she was paid 22-24.00 per hour, and commissions (85%) paid on services performed in the massage chairs at ██████████. The firm indicated the customer paid the firm. The firm determined the level of payment for the services provided. The firm indicated the worker did perform similar services for others. Their permission was not required. The firm stated she was represented as a contractor, but the services were performed under the firm’s business name. The firm indicated the contract ended.

The worker has also provided a copy of the independent contractor agreement, Declaration of IC Status Form, A copy of the firm’s website which lists pictures of their massage therapists, their history and a picture (wearing the firm’s staff shirts). The worker provided a copy of the schedules posted, that shows which room was scheduled to which therapist. The worker also provided copies of e-mails from the firm, stating they were rescheduling the room she was to work in, reminders to put the client charts back to the front desk after notating in the ██████████ pages (particularly for insurance patients). Asking if anyone is interested in picking up extra shifts, to help cover for vacations. A Notice of a Practitioner Breakfast/ Meeting notice was provided. An E-mail covering being on call – during that time they wanted them to be 15-20 minutes away. An E-mail covering reminders of end of shift things to be done, and the firm’s dress code. Lastly, the worker provided a copy of the firm’s policies and procedures, which listed the Mandatory Requirements. It covers dress codes, appointments (arrive 15 minutes prior to your appointments), many sections relevant to only the massage therapists. It covers time off, they encourage therapists to help cover each other’s shifts, they appreciate flexibility, and being a team player. Call in if you are sick so the Center can get a last minute sub. Only 1 person is allowed to request a shift off at one time. (on a first come first serve basis). Evaluations; the administration office would give clients an evaluation form; the firm utilized them to let them know what is being done right and wrong.

The question of whether an individual is an independent contractor or an employee is one that is determined through consideration of the facts of a particular case along with the application of law and regulations for worker classification issues, known as “common law.” Common law flows chiefly from court decisions and is a major part of the justice system of the United States. Under the common law, the treatment of a worker as an independent contractor or an employee originates from the legal definitions developed in the law and it depends on the payer’s right to direct and control the worker in the performance of his or her duties. Section 3121(d)(2) of the Code provides that the term “employee” means any individual defined as an employee by using the usual common law rules.

Generally, the relationship of employer and employee exists when the person for whom the services are performed has the right to control and direct the individual who performs the services, not only as to what is to be done, but also how it is to be done. It is not necessary that the employer actually direct or control the individual, it is sufficient if he or she has the right to do so.

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. We must examine the relationship of the worker and the business. We consider 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. The degree of importance of each factor varies depending on the occupation and the context in which the services are performed.

Therefore, your statement 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.

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## Analysis

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We have applied the above law to the information submitted. 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.

Evidence of control generally falls into three categories: behavioral control, financial control, and relationship of the parties, which are collectively referred to as the categories of evidence. In weighing the evidence, careful consideration has been given to the factors outlined below.

Factors that illustrate whether there is a right to control how a worker performs a task include training and instructions. In this case, you retained the right to change the worker's methods and to direct the worker to the extent necessary to protect your financial investment.

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.

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. In this case, the worker was not engaged in an independent enterprise, but rather the services performed by the worker were a necessary and integral part of your business. Both parties retained the right to terminate the work relationship at any time without incurring a liability.

## CONCLUSION

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. The services were provided under the firm's business name, and under the firm's policies and procedures. The firm stated they determined the rates charged to their clients. Per the web page, the massage therapists are listed, with their histories and shown wearing the firm's staff shirts (required dress code). The worker is paid by the hour, the firm's staff assigns clients. The worker's are required to be there 15-20 minutes prior to their appointments.