

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

Occupation

04MAN Managers/Supervisors

Determination:

☒ Employee☐ Contractor

UILC

Third Party Communication:

☒ None☐ Yes

I have read Notice 441 and am requesting:

☐ Additional redactions based on categories listed in section entitled "Deletions We May Have Made to Your Original Determination Letter"☐ Delay based on an on-going transaction☐ 90 day delay**For IRS Use Only:****Facts of Case**

The firm is in the business of operating a tattoo/piercing studio. The worker was initially engaged to provide some administrative services such as processing paperwork, inventory, scheduling, cleaning, and other odd jobs as well. He also provided services as a piercer for part of the time. He received a Form 1099-MISC for his services in 2012 through 2017. There was no written agreement for either service he provided.

The worker had experience in administrative-type duties but noted that the firm provided instructions on how to handle customer issues, schedule appointments, order and purchase supplies. He was added to firm's bank business account, told what hours to work as well as the need to submit vacation requests and tardiness notices. Both parties agreed that the firm provided body piercing training and instructions, from the owner as well as from a previous piercer. The firm noted that the worker chose his own work assignments; however, the worker noted that he received his work assignments both verbally and through text messages from the firm. Each party indicated that the other determined the methods by which the assignments were performed and would be contacted if any issues or problems arose. The worker submitted monthly profit/loss statements, weekly payroll reports, and monthly expenses/bills to the firm. The firm noted only that the worker reported piercings performed and percentages paid. His work schedule was during the firm's open hours at the firm's premises. He scheduled other service providers, checked firm's voice mail, email and social media accounts as well as cleaned all areas. However the firm noted that he chose his own schedule and filled in with other tasks when waiting for clients to come in. There were staff meetings. Both parties agreed that the worker was required to provide the services personally.

Both the firm and the worker agreed that the firm provided supplies, equipment, materials, and property; the worker indicated that items included office-related as well as those related to body piercing. The firm added that the worker supplied custom jewelry that he sold as well. The worker was paid a salary as well as a commission for body piercing. The firm agreed that the worker received a set amount per day and a percentage of his piercing revenue. Customer payments for all service providers were placed into a lock-drop box and payments to workers were issued on a weekly basis; balances were kept by firm. A log was kept indicating the services provided. The firm noted that the worker was paid and paid the firm commission at the end of each day. The worker did not pay rent or lease his workspace at the firm's establishment. Both parties agreed that the worker had no other economic risk other than loss of his salary. Each party indicated that the other established the level of payment for services.

The firm noted that there were no benefits provided; however, the worker's weekly salary did not change for any time off. The worker noted that either party could terminate the relationship without incurring a liability but the firm noted that as the worker was the only piercer at the firm, his leaving would cause a loss of business for the firm. Both agreed that the worker did not perform similar services for others. The firm noted that the worker provided piercing under the firm's business name with the worker noting that he was represented as the store manager. The relationship has ended.

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## Analysis

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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. The relationship of the worker and the business must be examined. 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 should be considered. 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.

Factors that illustrate whether there is a right to control how a worker performs a task include training and instructions. In this case, the firm retained the right to change the worker's methods and to direct the worker to the extent necessary to protect its financial investment. The firm operated a tattoo/piercing studio and engaged the worker to provide administrative support as needed for its operations. The worker had previous similar work experience and therefore did not require extensive instructions regarding those services. After some training was provided by the firm, he also performed piercing services as well. Though his hours might have varied, he worked during the firm's open business hours and according to any piercing appointments scheduled through the firm. If the nature of the occupation makes fixed hours impractical, a requirement that workers be on the job at certain times is an element of control. The worker's services for the firm were all performed at the firm's location, also a factor that suggests the firm's ability to retain control over the worker.

The worker provided services continuously throughout all the years involved. A continuing relationship between the worker and the person or persons for whom the services are performed indicates that an employer-employee relationship exists. A continuing relationship may exist where work is performed in frequently recurring although irregular intervals.

In addition, the worker was required to personally provide the services. If the services must be rendered personally, presumably the person or persons for whom the services are performed are interested in the methods used to accomplish the work as well as in the results.

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. The worker had no significant investment in the shop, equipment or materials. Lack of significant investment by a person in facilities or equipment used in performing services for another indicates dependence on the employer and, accordingly, the existence of an employer-employee relationship. The term "significant investment" does not include tools, instruments, and clothing commonly provided by employees in their trade; nor does it include education, experience, or training. He received a salary each week as well as a commission when applicable; he had no other economic risk other than the loss of his compensation. Payment by the hour, week, or month generally points to an employer-employee relationship, provided that this method of payment is not just a convenient way of paying a lump sum agreed upon as the cost of a job. The opportunity for higher earnings or of gain or loss from a commission arrangement is not considered profit or loss. The worker received a percentage of his receipts, guaranteeing him a minimum of any receipt. The customers essentially paid the firm through the use of a common lock-drop box. The worker reported his receipts by recording the services performed into the firm's log book.

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. The worker was engaged to provide administration services for the firm's operation as well as piercing services. When doing so, the worker was not engaged in a separate business venture for either service. Integration of the worker's services into the business operations generally shows that the worker is subject to direction and control. When the success or continuation of a business depends to an appreciable degree upon the performance of certain services, the workers who perform those services must necessarily be subject to a certain amount of control by the owner of the business.

Based on the above analysis, we conclude that the firm had the right to exercise direction and control over the worker for the entire work relationship to the degree necessary to establish that the worker was a common law employee and not an independent contractor operating a trade or business.

Please see Publication 4341 for guidance and instructions for firm compliance.