

SS-8 Determination—Determination for Public Inspection

Occupation

05PCP Personal Care Providers

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 business as a day spa. The worker was engaged by the firm as a licensed massage therapist and aesthetician. The firm stated that the parties operated under a contract, but did not provide a copy. The firm did not withhold taxes from the worker's remuneration in 2012 through 2017.

Information from the parties supports that while the firm relied upon the worker's prior training and experience to perform her services, it provided the worker with operational training. The firm provided the worker with her work assignments via a remote website. If problems or complaints occurred, the worker and firm were responsible for their resolution. The worker was required to submit invoices for services rendered. She performed her services on the firm's premises. The firm stated that the worker was not required to attend meetings, but the worker submitted a notice of a mandatory meeting to be held on November 15, 2016. The worker was required to perform her services personally.

The firm provided the property and was responsible for its associated costs. The worker provided any supplies or materials needed to perform her duties. She incurred expenses for education, supplies, uniforms/clothing, license, and insurance. The worker did not lease equipment or space. The firm paid the worker on a commission basis, with no guarantee of a minimum amount. It did not cover her under workers' compensation. Customers paid the firm directly at prices established by the firm. Neither party indicated an investment by the worker in the firm or a related business, or the risk of the worker incurring a financial loss beyond the normal loss of compensation.

The firm did not make general benefits available to the worker. It did not prohibit the worker from providing similar services for others during the same time period. There is no evidence presented showing the worker advertised her services or maintained a business listing. She provided her services under the firm's name. Both parties reserved the right to terminate the work relationship without incurring a penalty or liability, and in fact, the firm stated that it terminated the work relationship when it moved to an employee structure.

Analysis

Section 31.3121(d)-1(a)(3) of the regulations provides that if the relationship of an employer and employee exists, the designation or description of the parties as anything other than that of employer and employee is immaterial. Thus, if an employer-employee relationship exists, any contractual designation of the employee as a partner, coadventurer, agent, or independent contractor must be disregarded. Therefore, the firm's 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.

Factors that illustrate whether there was a right to control how a worker performed a task include training and instructions. In this case, while the firm relied upon the worker's prior training and experience, it must have been ultimately responsible for resolving any problems or complaints that may have occurred, showing it retained the right to change the worker's methods and to direct the worker to the extent necessary to protect its financial investment and ensure its clients' satisfaction. The worker performed her services on the firm's premises according to the clients scheduled by the firm. The worker was required to perform her services personally, meaning she could not engage and pay others to perform services for the firm on her behalf. 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. These facts show that the firm retained behavioral control over the services of the worker.

Factors that illustrate whether there was 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. "Profit or loss" implies the use of capital by a person in an independent business of his or her own. The worker provided her own supplies, insurance, clothing, etc. 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. The firm paid the worker on a commission basis. The opportunity for higher earnings or of gain or loss from a commission arrangement is not considered profit or loss. These facts show that the firm retained control over the financial aspects of the worker's services.

Factors that illustrate how the parties perceived 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 were part of the service recipient's regular business activities. In this case, the worker performed her services on a continuing basis. She performed her services under the firm's name. The worker was not engaged in an independent enterprise, but rather the services performed by the worker were a necessary and integral part of the firm's day spa business. 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. The worker could have performed similar services for others during the same time period; however, it is possible for a person to work for a number of people or firms concurrently and be an employee of one or all of them. Although the firm did not provide benefits to the worker, it terminated the work relationship without incurring a liability. The right to discharge a worker is a factor indicating that the worker is an employee and the person possessing the right is an employer. These facts show that the firm retained control over the work relationship and services of the worker.

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.